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THE JURIST is honored in the opportunity to offer its congratulations to Pope Pius XII on the occasion of the golden jubilee of his ordination to the priesthood. During every year of that half century his priesthood has been significant in its contribution to the substance of juridical science and in its efforts to raise that science ever higher in men's esteem. The ideal lawyer and priest he has been a model for all who find themselves dedicated to the same dual role. His exemplary discharge of the responsibilities imposed by that dual dediction has demonstrated beyond cavil that its respective functions enjoy perfect compatibility. While the whole Catholic world rejoices in the blessings with which it has been enriched during the fifty bounteous years of his service to it, THE JURIST joins in its joy with a special note of jubilance, for it pays tribute not only to its Chief Shepherd but also to an Angelic Pastor who is an unrivaled master of the law.

THE MEANING OF THE TERM "RATIONABILIS" IN THE CODE OF CANON LAW

WHILE the Canon Law of the Church finds its basis in the will of the legislator, it does not thereby disregard either the customs of people or their separate necessities, actual or relative.

It is possible, within certain definite limits, for a custom either to destroy an obligation arising from a law or to construct a new obligation not found in law. It is equally possible, again within certain definite limits, for an obligation of a law to be vacated by dispensation. In the latter case, the general obligation of the law remains, the particular obligation ceases.

Further, in regard to dispensation, the obligation of the law can in separate instances be vacated by the use of definite powers and faculties, or, where the text permits it, discretion can be used in disregarding the settled viewpoint and obligation of the law. This discretion is not always restricted to Superiors.

Obviously, whenever a custom is involved some reasonable practice different from the law must be demonstrated. It is equally obvious that reasons superior to those of the legislator must exist before a law is relaxed. In the latter case, some elasticity is permitted for, at times, definite powers are required for the dispensation from the law while, at other times, immediate discretion can be used.

In *The Code of Canon Law* every deviation from the law in the sense of custom or dispensation is controlled ultimately by the term "rationabilis". This term, it is true, is not always found in the text of the separate canons but it is found

in the canons which lay down the fundamental rules for custom and dispensation. These canons are found in the first book of *The Code of Canon Law.* In other parts of the Code less fundamental uses of the term are discovered. These latter uses are largely exercises of discretion.

It is the purpose of this article to show how the term "rationabilis" is used in the separate canons. There is, therefore, no intention of presenting a commentary on the canons in which this term is found. Of course, the obligation of the law as stated in the separate canons must be mentioned so that the contrast introduced by the term "rationabilis" can be studied. But, in so far as it is possible, discussion of the primary obligation of the law will be avoided.

I. The Fundamental Use of the Term "Rationabilis"

A. *The fundamental use in regard to custom*

As it is indicated by St. Thomas of Aquin the fundamental purpose of a custom is to show the reasonableness of an act.[1] This fundamental purpose is equally evident in all legitimate customs no matter whether they are contrary to or beyond the law. In this sense a custom is considered by St. Thomas as an interpreter of the law and it possesses the force of law.[2] This is not exactly and primarily the meaning of canon 29 for this canon considers customs introduced according to the law.[3] In such customs the substance of the obligation arising from law is preserved while the details of this obligation are altered. These customs are not considered here.

Custom as indicated by St. Thomas and as taught generally since his time does not infringe upon the prerogative of the

1 *Summa Theologica,* (Romae, 1894), I, II, q. 97, art. 3 *in corp.*

2 *O. c., l. c.,* . . . cum enim aliquid multoties fit, videtur ex deliberato rationis judicio provenire: et secundum hoc consuetudo et habet vim legis, et legem abolet, et est legum interpretatrix.

3 Consuetudo est optima legum interpres.

legislator to enact law.[4] Before Gratian some hesitancy was shown in admitting customs contrary to the law because they appeared to be destructive of legislative power but no such hesitancy was shown in admitting customs beyond the law. In point of fact many laws have their origin in customs beyond the law.

Since there is not now any question of the violation of any hierarchical principle in admitting customs both contrary to and beyond the law, it remains only to see how the reasonableness of an act can be incorporated in a custom.[5] Other requisites demanded in custom before it can either destroy an obligation or construct a new one are beyond the scope of this article.

The quality of reasonableness will be considered separately in regard to custom contrary to the law and customs beyond the law.

1) *Customs contrary to the law*

It is and should be readily assumed that the legislator, in formulating his law, has determined upon some action which will be for the common welfare of the society. The reasons and causes which influence a legislator to consider this action appropriate rather than another are items which are both useful to know for the interpretation of law and of importance in the discussion of customs contrary to the law. Once the law is established it is rightly presumed to be just and useful. So strong is this presumption that a custom contrary to the law must be demonstrated as better fitted to meet a situation or equally demonstrated as an indication that the law is unjust or useless. It is true that since *The Code of Canon Law* nowhere directly determines what is meant by the term "rationabilis", simple non-observance of law can indicate the mind of the people in regard to the justice or utility of a law.

[4] Several decretals, however, can be adduced denying validity to customs. Cf. c. 2, X, *de probationibus*, II, 19; c. 8, X, *de sententia et re iudicata*, II, 27; c. 3, X, *de fideiussoribus*, III, 22.

[5] Canon 25 states the principle of authority in the matter of custom.

This does not mean that the people in disregarding a law either resent it or question the authority of the legislator. All non-observance means is that, in the judgment of the people, the law is either unsuitable due to definite circumstances or less useful than the legislator considered it. In this sense, Canon Law in its aspect of human ecclesiastical legislation is put to the same test as any other system of law. Canon Law admits this in permitting customs contrary to it.

a) In canon 27, the term "rationabilis" is used three times. Twice this term is used in a positive sense: once in a negative sense. The two positive uses of this term can be considered together.[6]

The pertinent text of canon 27, § 1 is taken partly from a decretal of Pope Gregory IX.[7] In this decretal, the Pontiff condemns as an abuse any custom contrary to the natural law but he admits a custom contrary to positive law if it is reasonable and legitimately prescribed.[8] Commentaries on this decretal uniformly stress the necessity of the reasonableness in an act before it can operate contrary to a law, but, as Reiffenstuel observes, considerable difference exists among commentators in pointing out in what precisely consists the concept of reasonableness.[9] Reiffenstuel himself maintains that any custom repudiated by law, or offering a license, or occasion to sin or harmful to the community is unreasonable.[10] Reiffenstuel condemns as unsatisfactory the opinion of Navarrus that only customs contrary to the divine law are inadmissible.[11]

[6] § 1. . . . sed neque iuri ecclesiastico praeiudicium affert nisi fuerit rationabilis etc: . . . sola praescribere potest rationabilis consuetudo etc.

[7] C. 11, X, *de consuetudine*, I, 4.

[8] . . . ut vel iuri positivo debeat praeiudicium generare, nisi fuerit rationabilis et legitime sit praescripta. This text is based upon Roman Law (C. 8, 52, 2). Cicognani says that the force of this text is controverted: cf. *Commentarium ad librum I Codicis*, (Romae, 1925), pp. 153-154.

[9] *Jus Canonicum*, (Parisiis, 1864), lib. I, tit. IV, no. 31.

[10] *O. c., l. c.*, no. 34.

[11] *O. c., l. c.*, no. 32.

Suarez considers at length the reasonableness and unreasonableness of a custom.[12] As far as reasonableness is concerned, Suarez states the same doctrine as Reiffenstuel who indeed cites him as his authority.[13] Suarez distinguishes between the good and evil of an act and between the reasonableness and unreasonableness of this act. The latter distinction is based on the relation of the act to common use.[14] This use, however, is subject to control by law which can abrogate, prohibit or repudiate it.[15]

Modern canonists have adopted the earlier strictures on the unreasonableness of an act and have made some effort to show in what the unreasonableness of an act consists. It is precisely on this point where, if possible, instruction is desirable. Apart from the fact that simple non-observance may destroy the obligation of law, it remains true, as indicated by St. Thomas, that a custom contrary to the law must be based on reason as much as the law itself is based on reason. Hence, the efforts of Michiels and Van Hove are to be commended as indicating how the term "rationabilis" is to be interpreted. Beste can also be cited for his brief but significant statement on the reasonableness of a custom.[16]

Michiels maintains that any general utility suffices for a custom contrary to the law.[17] According to this opinion, it is better to permit people to be governed by their own customs whenever this is not contrary to natural law. Especially would this be true when the legislator can no longer hope that his law will be obeyed. Michiels does not descend to particulars in order to demonstrate how general utility is to be interpreted.

[12] *De Legibus ac Deo Legislatore,* (Neapoli, 1872), lib. VII, c. VI.

[13] Suarez, *o. c., l. c.,* no. 10: Reiffenstuel, *o. c., l. c.,* no. 34.

[14] *O. c., l. c.* . . . videntur considerandae ex proportione ad communem usum, etc.

[15] Cf. *o. c.,* lib. VII, c. VII.

[16] *Introductio in Codicem,* (Collegeville, 1944), p. 93.

[17] *Normae Generales Juris Canonici,* (Lublin, 1929), vol. II, p. 89.

Van Hove maintains that no special utility is required in the reasonableness of a custom contrary to the law.[18] Nor is any special rectitude required in the act itself. All that is required is that the custom be not contrary to public utility. Like Michiels, Van Hove does not discuss particular cases but he does say that the utility of the law destroyed by custom is compensated by the removal of a greater evil and by the conciliation of the people.

Perhaps it is impossible to go further than Michiels and Van Hove have done in trying to establish a positive aspect of the reasonableness in customs contrary to the law. This seems to be the opinion of Prümmer who, citing Reiffenstuel, says that particular cases must be left to the prudent will of judges.[19] Reiffenstuel himself says that this is the common opinion. The reason advanced is that any act in itself honest and conducive to the public good can be reasonable in one place, unreasonable in another.[20] Besides, these aspects can change so that the contrary will in time appear. Hence no definite and certainly no final judgment can be made by the people on the positive aspect of the reasonableness of a custom contrary to law. In cases of doubt a custom, according to Reiffenstuel, should be presumed reasonable.[21] While this last statement can be referred to the judgment of the people, Reiffenstuel actually makes it in reference to the judgment pronounced by those who are to determine the reasonableness of a custom. This would mean a judgment on the part of authority.

Both before and after the promulgation of *The Code of Canon Law* most canonists and moralists did little more than

18 *De Consuetudine: de Temporis Supputatione,* (Mechliniae-Romae, 1933), p. 93.

19 *Manuale Iuris Ecclesiastici,* (Friburgi Brisgoviae, 1920), p. 15: Reiffenstuel, *o. c., l. c.,* no. 41.

20 Cf. also Guilfoyle, *Custom,* (Washington, 1937), p. 99.

21 *O. c., l. c.,* no. 43.

stress the negative aspect of reasonableness. Some, however, like Wernz [22] and Maroto [23] said that the same reasonableness which should exist in a law should also be found in a custom contrary to the law. This is not really a vague or indefinite statement as actual items can readily be produced to be apt matter for legislation. Experience, of course, teaches whether a law continues useful. It is along this line that customs contrary to the law should be examined.

Canon 27, § 1 also contains the term "rationabilis" in reference to immemorial customs contrary to a law prohibiting customs. The use of this term in this instance is no different essentially from the use described above. Longer time, however, is necessary before such a custom can be legitimately prescribed. It is superfluous to say that prohibition of a custom is not its repudiation.

b) Canon 27, § 2 states when a custom is unreasonable.[24] This text primarily refers to the actual canons of the Code. Jurisprudence, however, derived from the commentaries before the Code according to the law of canon 6, 2° actually indicates other customs as unreasonable.[25] Consideration here, however, will be limited to the primary meaning of canon 27, § 2.

The law of canon 27, § 2 is comparatively simple to apply. All the difficulties which would be encountered in estimating the reasonableness of a custom contrary to the law are eliminated in this paragraph of the canon. Even practices which do not evidently fall under the strictures of jurisprudence before *The Code of Canon Law* are, if repudiated according to canon 27, § 2, unsuitable matter for customs. Such matter,

[22] *Ius Decretalium,* (Prati, 1913), tom. I, p. 292.

[23] *Institutiones Iuris Canonici,* (Romae, 1921), tom. I, p. 269.

[24] § 2. Consuetudo quae in iure expresse reprobatur, non est rationabilis.

[25] Cf. e.g., Reiffenstuel, *o.c., l.c.,* no. 34; De Angelis, *Praelectiones Juris Canonici,* (Romae-Parisiis, 1877), tom. I, p. 80; Zallinger, *Institutiones Juris Ecclesiastici,* (Romae, 1832), lib. I, tit. IV, §§ 223-226.

even if practiced for many years, never receives the necessary consent of the legislator. It follows, therefore, that strict interpretation of canon 27, § 2 is necessary before a custom can be legally stigmatized as unreasonable. Deductions from the texts of law, comparisons between laws as well as simple opposition to law are not in themselves sufficient to render a contrary custom unreasonable.

If the specific text of law does not expressly repudiate a contrary custom, this custom cannot immediately be considered as an unreasonable custom. Jurisprudence may condemn it but this is outside the primary force of canon 27, § 2.[26]

There are in all twenty-one instances in *The Code of Canon Law* where a clause repudiates a contrary custom.[27] As Michiels observes, all these canons concern fundamental ecclesiastical doctrine or discipline.[28] Thus, for instance, five canons at least repudiate customs contrary to the administration of the Sacraments.[29] Attention should be called to the repudiation of the custom condemned in canon 1181.[30] No custom, no matter how old or difficult to abolish should protect the practice of violating canon 1181.[31] The entrance to the church is not the place to collect money.

[26] Zallinger, *o. c., l. c.,* gives a long list of such condemned customs. This list can be studied profitably. Zallinger gives the references to the decretals where the text embodying the condemnation of these customs can be found. An equally satisfactory list is contained in Cicognani, *o. c.,* pp. 167-169.

[27] Cc. 343, § 2, 346, 396, § 2, 403, 409, § 2, 418, § 1, 433, § 1, 455, § 1, 460, § 2, 774, § 1, 818, 978, § 3, 1006, § 5, 1041, 1056, 1181, 1356, § 1, 1408, 1492, § 1, 1525, § 1, 1576.

[28] *O. c.,* vol. II, p. 88: cf. also Cicognani, *o. c.,* p. 166.

[29] Cc. 774, § 1, 818, 978, § 3, 1006, § 5, 1041: Michiels, *o. c., l. c.,* adds cc. 1056, 1356, § 1.

[30] Ingressus in ecclesiam ad sacros ritus sit omnino gratuitus, reprobata qualibet contraria consuetudine.

[31] This abuse was severely criticized and ordered abolished in the United States by the Sacred Congregation for the Propagation of the Faith in a letter dated Aug. 15, 1869: *Collectanea,* 1345. No criticism was intended in regard to the practice of Offertory collections.

2) *Customs beyond the law*

Canon 28 provides for customs beyond the law.[32] More conditions must be fulfilled before this type of custom is established than are necessary in demonstrating a custom contrary to the law. All these conditions are outside the scope of this article except the condition of reasonableness.

In a sense it is comparatively easy to see the reasonableness of acts leading to a custom beyond the law. This is so because the concept of the term " rationabilis " as it is used in canon 28 is entirely positive. This concept can be clarified by comparisons with established law either universal or particular. In a word no act can be prescribed by custom which could not have been suitable matter for legislation.[33]

Van Hove says in his comparison of customs that greater relationship to the common good is necessary in customs beyond the law.[34] The reason for this is that something additional beyond what the law provides must be contributed to the common good. Relying on the doctrine of Suarez,[35] Van Hove maintains that this is generally found in subjecting oneself to established customs. Of course, the will to follow these customs must be present before an obligation can arise.

Michiels says something positive must be contributed toward the good of society before a custom beyond the law can be obligatory.[36] This, he says, can usually be presumed if the other conditions are fulfilled.[37] Guilfoyle holds the same opinion but bases it on the term " pariter " found in canon 28.[38] Guilfoyle further maintains that a custom beyond the

[32] Consuetudo praeter legem . . . legem inducit, si pariter fuerit rationabilis etc.

[33] Zallinger, *o. c., l. c.,* § 222.

[34] *O. c.,* p. 93.

[35] *O. c.,* lib. VII, c. VI, no. 16-17, c. XVIII, no. 9-10.

[36] *O. c.,* vol. II, p. 88: cf. also Reiffenstuel, *o. c., l. c.,* no. 35.

[37] *O. c.,* vol. II, p. 90.

[38] *O. c.,* p. 122.

law can be repudiated as unreasonable. He cites canon 1041 which forbids the introduction of new matrimonial impediments.[39]

B. *The fundamental use in regard to dispensation*

In his study of the history of dispensations in Canon Law, Brys intimates that the Decretalists considered the adjectives "iusta" and "rationabilis" convertible in reference to the necessary cause for dispensation.[40] This is probably true in so far as a just cause did not imply a definite obligation on the part of the Superior to concede a dispensation.[41] Today, however, it is certain that a difference exists between these two adjectives. Often enough these adjectives are found together in *The Code of Canon Law*[42] but the adjective "iusta" is also found in union with other adjectives, viz., "gravis",[43] "canonica",[44] "necessaria".[45] The term "rationabilis" is sometimes found alone,[46] sometimes with the adjective "gravis".[47]

All this indicates that these two terms are not today convertible.

[39] Consuetudo novum impedimentum inducens . . . reprobatur.

[40] *De Dispensatione in Iure Canonico,* (Brugis, 1925), p. 188: iusta, i.e., rationabilis, p. 189: Etenim . . . iam constat causam "iustam" auctoribus illis idem esse ac rationabilem seu aequam. Pope Benedict XIV also apparently considered "causa iusta" and "causa rationabilis" convertible: cf. *De Synodo Diocesana,* (Romae, 1767), lib. 13, c. 5.

[41] For the controversy concerning and the distinctions in regard to dispensations, cf. Brys, *o.c.,* pp. 181-185.

[42] E.g., cc. 419, § 1, 776, § 1, 2°, 1109, § 2, 1386, § 2, 1402, § 2.

[43] E.g., cc. 464, § 2, 556, § 3, 1274, § 1. Michiels, *o.c.,* vol. II, pp. 506-507, gives a list of canons where the various types of causes can be seen. O'Mara, *Canonical Causes for Matrimonial Dispensations,* (Washington, 1935), pp. 47-53, describes these different types of causes in detail.

[44] C. 1427, § 1.

[45] Cc. 1517, § 1, 1676, § 3.

[46] E.g., cc. 735, 859, § 1, 1030, § 1.

[47] E.g., 755, § 2.

Cicognani says that "iusta causa" indicates the proportion between the law and the dispensation and that "rationabilis" has reference to prudence, equity and practical circumstances.[48] This statement can be accepted as properly interpretative of the meaning of these terms in regard to dispensations.

Canon 84, § 1 says that a dispensation should not be granted without a just and reasonable cause considered in relation to the law to be relaxed.[49] All these conditions are necessary, either for the liceity, or, in the case of lower Superiors, for the validity of a dispensation. But the only condition to be discussed here is the reasonableness of the cause required. Other conditions are beyond the scope of this article.

The reasonableness of the cause in dispensations rests ultimately on the proper discharge of a Superior's duty. This is outlined by St. Thomas who says a Superior is faithless to his duty if he dispenses without regard to the common good or imprudent if he ignores a reason for dispensing.[50] As Michiels observes, no general rule can be set down which would always be applicable.[51] This is clearly evident in regard to matrimonial dispensations where a more serious cause is required to dispense from diriment impediments than would be required to dispense from impedient impediments.

Prudence considering equity and the practical circumstances of each case must determine whether a cause is not only just but also reasonable.

Michiels cites Suarez in maintaining that if the purpose of the law is unobtainable in a particular case, sufficient cause for dispensation exists.[52] This is true in regard to the justice of the cause but further judgment of the Superior is required before such a cause can be called reasonable. This judgment

[48] *O. c.*, p. 331.

[49] A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione gravitatis legis a qua dispensatur.

[50] *O. c.*, I, II, art. 4 *in corp.* Cf. Cicognani, *o. c.*, pp. 331-332.

[51] *O. c.*, vol. II, p. 503.

[52] *O. c.*, vol. II, p. 504: Suarez, *o. c.*, lib. VI, c. XVIII, no. 17.

cannot be given affirmatively if a dispensation would produce harm to the common good. Prudence would also deny such a dispensation if harm to the petitioner would certainly arise from the relaxation of the law.

Here it should be noted that at times the legislator has determined a reasonable cause even if no valid cause at all is offered by the petitioner. This occurs, at least, in the concession of dispensations from minor matrimonal impediments.[53] Van Hove suggests that a doubt regarding the necessity for a dispensation is sufficient reason for conceding a dispensation.[54]

Little more can be said concerning the term "rationabilis" as it is used in canon 84, § 1. Commentators discuss at length the necessity of a cause, etc., but seldom is a clear-cut distinction made between the terms "iusta" and "rationabilis". Yet this distinction as outlined by Cicognani is necessary for the proper interpretation of this canon. If this author's explanation is accepted, the emphasis is placed on the prudent judgment of the Superior in the concession of a dispensation.

The above exposition of the pertinent parts of canons 27, 28 and 84, § 1 was made in reference to all ecclesiastical law where a custom is either admitted or repudiated and where a dispensation is possible.

It is, therefore, taken for granted that constant reference by proper authority to these canons will be made whenever a question arises concerning custom or dispensation.

It should be added, however, that the use of the term "rationabilis" in canon 84, § 1 is closely associated either with the use of ordinary power or the use of specific faculties conceded by the legislator. Thus a knowledge of canons 81 and 82 for the use of ordinary power and of canon 66 for the use of specific faculties is necessary.

53 Cf. c. 1054: cf. also cc. 40, 45.

54 *De Privilegiis: de Dispensationibus,* (Mechliniae-Romae, 1939), p. 415: cf. also c. 15.

For these reasons, canons 27, 28 and 84, § 1 were set apart and called the fundamental use of the term "rationabilis". What further remains to be considered regarding this term is less fundamental to the immediate purpose at hand. In the separate canons which follow, the content of the canon may be very important but the use of the term there is less fundamental because it is limited to a specific canon.

II. The Discretionary Use of the Term "Rationabilis"

It is manifest that in the separate canons of the Code a definite manner of action is set down in definite terms embodying the will of the legislator. From this legislation normally no deviation is permitted except in so far as the law itself permits custom and dispensation. This is the general rule which needs merely to be stated.

There are, however, in *The Code of Canon Law* a number of prescriptions which permit the use of individual discretion quite apart from custom and dispensation. It would not, indeed, be inaccurate to say that the law itself in these instances contains a dispensation from the mode of action stated in the law but such a dispensation would not directly fall under the full and immediate force of canon 84, § 1. This is amply demonstrated by the fact that deviation from the law is at times permitted in these canons without specific and separate approval of the legislator.[55] The discretion of the individual person or minister is sufficient to act in such circumstances.

The term "rationabilis" in the canons to be studied here does not confer any real option in obeying or disregarding the law. It is always understood that the mode of action set down in the law is normally the course to follow. Where discretion is permitted, the law itself will provide, at least in general terms, an alternative course. It is not, therefore, an equal choice which is offered by the term "rationabilis". Rather must it be said that a concession is made whereby an

[55] Cf. e.g., cc. 357, § 2, 947, § 3, 1030, § 1.

impelling and sufficient reason is recognized as obviating the obligation set down in the law.

It is along this line and with a concern for the various qualifications, if they exist in the separate canons, that the term "rationabilis" must be examined. Not in every instance is a qualification found in the pertinent canons. Where no qualification exists or where it can be said to be of minor importance discretion will approximate a real choice. But where the law limits discretion to extraordinary or individual cases, etc., the spirit of canon 84, § 1 [56] should influence one's action.

It should also be mentioned here that the reasonableness of the cause adduced in the following canons is not so weighty as would justify an actual dispensation from the law itself. Certainly if a reasonable cause for a dispensation is less serious than an actual excuse from the obeying the law, the reasonableness of a cause in matters of discretion can be even less weighty. This does not in any sense weaken the importance of the obligation found in the law. It merely sets forth the comparative importance of reasons in relation to the obligation of law. Where discretion is permitted, a dispensation is not needed. Where a dispensation is needed, an alleged excuse is not sufficient to obviate the law.

In the discussion which follows the only point to be examined is the interpretation of the term "rationabilis". Whatever controversy may exist in regard to other terms is beyond the scope of this article.

A. *Discretion not further qualified in the pertinent canons*

There are four canons in which the term "rationabilis" is found without any specific qualification in the text of these canons. Jurisprudence, however, has in some of these cases furnished certain limits within which the reasonableness of a cause is to be sought. Hence, although no immediate qualifi-

[56] . . . habita ratione gravitatis legis a qua dispensatur.

cation is set down in these canons, it would be improper to disregard the earlier interpretation of these laws.

These four canons will be studied primarily from the viewpoint of the text of the law. Mention will be made where jurisprudence furnishes a guide to interpretation.

1) Canon 357, § 2 mentions that the dioecesan synod should be held in the Cathedral unless a reasonable cause persuades otherwise.[57]

The judge of the reasonable cause in canon 357, § 2 is obviously the Bishop of the diocese. This has always been his choice as Pope Benedict XIV demonstrates.[58] This demonstration is given in detail and furnishes freedom to the Bishop in holding a diocesan synod. Fundamentally the argument of Pope Benedict XIV is based upon a decretal of Pope Boniface VIII.[59] The dioecesan synod according to Pope Benedict can be held in any church although the Cathedral should be used if at all possible.[60]

Pope Benedict XIV says it is the universal custom to hold a synod in a church.[61] This statement is generally supported today by canonists.[62] If the Cathedral is not available, Wernz-Vidal suggest the use of the seminary chapel.

From this it may be concluded that a Bishop has discretion in the selection of a church in which to hold a diocesan synod.

[57] Celebranda est [Synodus dioecesana] in ecclesia cathedrali, nisi aliud rationabilis causa suadeat.

[58] *O. c.*, lib. 1, c. 5.

[59] C. 7, *de officio ordinarii*, I, 16 in VI°. Quum episcopus in tota sua dioecesi iurisdictionem ordinariam noscatur habere, dubium non existit, quin in quolibet loco ipsius dioecesis non exempto per se vel per alium possit . . . quae ad ipsius spectant officium, libere exercere.

[60] *O. c., l. c.* Inter ecclesias, si fieri possit, eligenda est Cathedralis, . . . quamvis urgente rationabili et honesta causa, non prohibeatur Episcopus Synodum facere in alia ecclesia.

[61] *O. c., l. c.* Pope Benedict XIV cites Mendoza as establishing that most synods including Councils were held in a church.

[62] E. g., Wernz-Vidal, *Ius Canonicum*, (Romae, 1923), tom. II, *De Personis*, p. 666.

Strictly, however, from the text of canon 357, § 2 he cannot be restricted to the use of a church, if in his judgment, a synod is better held elsewhere. But it is difficult to see how the ritual prescribed in the *Pontificale Romanum* can be adequately carried out if the synod is not held in a church.[63]

2) Canon 796, 1° permits a reasonable cause in selecting the same sponsor for baptism and confirmation.[64] The judgment of the confirming prelate is final. Thus even reasons of convenience which do not even approximate a necessity will be sufficient. Once the judgment of the minister of the sacrament is expressed, there is no longer any question of the liceity of the act of sponsorship.

3° of this canon establishes some restrictions which are not immediately pertinent to the idea contained in 1°.[65]

3) Canon 867, § 4 indirectly supports the prohibition of distributing Holy Communion whenever Holy Mass is celebrated if a reasonable cause exists for this prohibition.[66] The principal meaning, however, of this canon allows the distribution of Holy Communion even at hours when Holy Mass cannot be celebrated. Normally, the judge of the reasonable cause in this instance is the minister of the Sacrament.

However, the judge of whether or not Holy Communion can be distributed at Holy Mass is not the pastor or the celebrant of the Mass but the Ordinary. This is established at least for the Midnight Mass of Christmas by the Pontifical Commission for the Interpretation of the Code.[67] The Ordinary, however, is bound to observe the law of canon 869 where

[63] Cf. *Pontificale Romanum, pars tertia,* Ordo ad Synodum.

[64] Sit alius a patrino baptismi, nisi rationabilis causa, iudicio ministri aliud suadeat, etc.

[65] Serventur praeterea praescripta in can. 766. This canon refers to the liceity of sponsors in baptism.

[66] Sacra communio iis tantum horis distribuatur, quibus Missae sacrificium offerri potest, nisi aliud rationabilis causa suadeat.

[67] March 16, 1936: cf. Bouscaren, *The Canon Law Digest,* (Milwaukee, no date), vol. II, under c. 867.

restrictions on the distribution of Holy Communion are limited to particular cases.[68] Constant recurrence of the danger of profanations and indecencies may influence the Ordinary to repeat his prohibition but no general prohibition is contemplated in canon 869. Nor is there any authorization in canons 867, § 4 and 869 to impose further conditions of abstinence, etc., before Holy Communion can be received.

4) Canon 878, § 2 warns against too stringent restrictions on the faculties to hear confessions unless a reasonable cause is present.[69]

The Ordinary or the religious Superior is obviously the judge of what a reasonable cause may be relative to the restriction of faculties. There is little challenge of restrictions in regard to the time and place of the use of faculties provided these restrictions are not productive of undue hardship on either the confessor or the penitent.

It should be unnecessary to state that a reasonable cause for restriction must be founded not on the feelings of the Ordinary or religious Superior but on the greater good which conceivably might arise from prudent restrictions.

Commentators in discussing canon 878, § 2 naturally indicate what is not a reasonable cause for restriction. Thus, for instance, Aertnys-Damen deny the justice of the limitation regarding the sick.[70] Similar denial is made regarding the exception of Paschal time from the use of faculties. These denials are based upon several responses of the Holy See where these specific restrictions are condemned.[71] Cappello correctly states that any restriction is itself odious and should not be imposed without sufficient cause.[72]

[68] . . . nisi, loci Ordinarius, iustis de causis, in casibus particularibus id prohibuerit.

[69] Caveant . . . ne iurisdictionem aut licentiam sine rationabili causa nimis coarctent.

[70] *Theologia Moralis,* (Buscoduci, 1920), tom. II, p. 152.

[71] Cf. *Fontes,* 1713, 1765, 1774, 2726, 2734, 2808, 2812.

[72] *De Sacramentis: de Poenitentia,* (Taurinorum Augustae-Romae, 1929), p. 301.

Perhaps the most significant review of the limitations of faculties can be seen in a letter of Pope Gregory XVI.[73] In this letter, the Pontiff warns that the law permitting the limitation of faculties does not include capricious and useless limitations.

The immediate purpose of the letter of Pope Gregory XVI was to criticize the undue limitations attached to the faculties of Jesuits by the Archbishop of Paris. Consideration, however, of this letter can go beyond its immediate purpose for it reviews the theology of the Sacraments and demonstrates the need for ample faculties to absolve.

The judgment of the Ordinary or of the religious Superior is final in the immediate use of faculties. This judgment is not to be censored if circumstances regarding time, place and person demand a limitation of faculties. Certainly, the knowledge, competence and experience of priests requesting faculties will have some influence on the faculties conceded. The principal purpose of canon 878, § 2 is to warn against undue restrictions. Once a restriction is made, it must be presumed to be just and reasonable.

B. *Discretion qualified in the pertinent canons*

In the study of the fourteen canons which follows some qualification is made in the text of the pertinent canon before discretion can be used. These qualifications can be reduced to conditions.

In this way these canons differ from those discussed above where discretion is limited, if at all, not by the text of the pertinent canon but by jurisprudence.

Sometimes in the following canons the qualification of a reasonable cause is made by the simple addition of an adjective; at other times further qualification is made by reducing the use of discretion to individual and even extraordinary cases. Since, however, all these canons contain some qualification they will be considered in their numerical order irre-

[73] Ep. *Allatum isthinc*, Oct. 12, 1843, *Fontes*, 501.

spective of the kind or weight of the qualification found in the canon.

1) Canon 419, § 1 permits substitution for service in choir for a just and reasonable cause.[74] The judge of this cause is the person who makes the substitution. No permission is required.[75]

Discretion, however, is qualified in this canon by various items. In the first place, discretion cannot be used if all the canons of the Chapter must always be present. Discretion can be used if the canons serve in rotation. If this latter situation obtains, discretion is then restricted to a choice of one of the same grade included in the Chapter but not that day bound to service in choir. Lastly, discretion can be used only in particular cases. No general substitution is permitted.

The judge of the reasonable cause is the canon or beneficiary himself. Serious inconvenience is certainly a reasonable cause for substitution. The judgment of the canon or beneficiary must be accepted. Control of abuse naturally lies with the Ordinary.[76]

2) Canon 604, § 1 permits the entrance into the cloister of religious Congregations whenever the Superior has a just and reasonable cause.[77] The Superior is the judge of this cause. Schaaf contends that this judgment can be made by the local Superior since the canon does not restrict the judgment to a higher Superior.[78] Schaaf suggests that appreciation of the

[74] . . . nisi in casibus particularibus, iusta ac rationabili de causa, etc.

[75] Bouscaren, *o.c.*, vol. II under c. 419. P.C. July 25, 1926. Cf. also Wernz-Vidal, *De Personis*, p. 735, and footnote no. 158.

[76] Cf. S.C.C., *Alatrina*, March 24, 1612, § 2: *Fontes*, 2390. In § 2 of this response no cause for substitution was required but the Bishop was expected to see that no abuse resulted: § 1 of this response which is cited in the footnotes to canon 419, § 1 restricts substitution to canons in the Cathedral city or its suburbs. The Code has altered the force of this response.

[77] . . . aliique quos ex iustis et rationabilibus causis Superiores admitti posse censuerint.

[78] *The Cloister*, (Cincinnati, 1921), p. 156.

service of benefactors would be a sufficient reason to permit entrance into the cloister. He warns, however, that rules of the Congregation, stricter than the Code, must be observed.[79] Schäfer suggests that parents and close relatives of a seriously ill religious could be admitted into the cloister.[80] Reasons of this kind must surely be acceptable.

In the estimation of a reasonable cause, as indicated in this canon, a Superior must keep in mind that no extremely strict papal cloister is contemplated here. It would, therefore, be improper, if canon 604, § 1 were interpreted as if no greater concession were contained therein than could be found in canons 598 and 600 where papal cloister for men and women is enacted.

3) Canon 637 authorizes the refusal to admit to a renewal of vows or to perpetual profession if a just and reasonable cause exists.[81] This cause cannot, however, be illness unless this state was maliciously concealed before profession.[82]

The rather obvious reasonable causes suggested by Schäfer include insufficient intellectual ability and defect of religious character and vocation.[83] Fanfani suggests as a reasonable cause an evil habit without immediate hope of correction.[84]

4) Canon 755, § 2 authorizes the local Ordinary to allow the ritual for the baptism of infants to be used for the baptism of adults when a grave and reasonable cause exists.[85]

Pope Leo XIII outlined the reasons when the local Ordinary could concede the use of the ritual for the baptism of

[79] *O. c., l. c.*

[80] *De Religiosis,* (Münster, 1931), p. 565.

[81] . . . pariter religio ob iustas et rationabiles causas eundem [professum] potest a renovandis votis temporariis vel ab emittenda professione perpetua excludere.

[82] The footnotes to c. 627, *Fontes,* 1790, 2048, refer to this item.

[83] *O. c.,* p. 724.

[84] *De Iure Religiosorum,* (Taurini-Romae, 1925), p. 481.

[85] Loci Ordinarius potest gravi et rationabili de causa indulgere, etc.

infants.[86] The principal reasons are lack of time and physical weakness. Other reasons grave in themselves could also be followed. It must be remembered, however, that some real difficulty must arise in the use of the ritual for the baptism of adults before it can be displaced by the other ritual.

Indults are conceded in this matter. These are in addition to the power granted in canon 755, § 2.

Cappello properly indicates when in addition to canon 755, § 2 the ritual for the baptism of infants can be used.[87] This for the most part concerns the conditional baptism of adults.

5) Canon 776, § 1, 2° permits the local Ordinary to allow baptism at home in an extraordinary case for a just and reasonable cause.[88]

This canon is based on a decretal of Pope Clement V in which it is stated that besides the baptism of the children of royalty, only necessity will permit baptism at home.[89] The Code is more lenient and permits other reasonable causes in addition to necessity but it must be kept in mind that no matter how grave the cause, no general rule can be established contrary to this canon. As it is stated in the law, this is an obligation resting upon the prudent will and conscience of the local Ordinary.

A custom contrary to this law was already condemned in the seventeenth century.[90]

Reasons of distance or inconvenience which militate against baptism in the proper church are not sufficient for baptism at home. Such reasons are amply satisfied in canon 775.[91]

[86] Litt. ap. *Trans Oceanum,* April 18, 1897; *Fontes,* 633.

[87] *De Sacramentis in genere: De Baptismo, Confirmatione et Eucharistia,* (Taurinorum Augustae, 1921), p. 128.

[88] . . . iusta ac rationabili de causa, in casu aliquo extraordinario, etc.

[89] C. un. *de baptismo et eius effectu,* III, 15 in Clem: cf. also *Fontes,* 413, § 19.

[90] S.C.C., June 16, 1635, ad 2: *Fontes,* 2576: cf. also *Fontes,* 812, 819.

[91] . . . a parocho conferri potest et debet in proxima ecclesia aut oratorio publico, etc.

6) Canon 791 permits the minister of confirmation to choose a place other than a church for the administration of the Sacrament if he has a just and reasonable cause.[92] The entire judgment is the minister's even if he confirms outside of his own diocese.[93] A grave cause is not required but some suitable place is necessary.[94]

7) Canon 796, 2° permits the minister of confirmation to allow the presence of a sponsor of the opposite sex of the person to be confirmed if a reasonable cause exists.[95] Any reasonable cause will be sufficient but the judgment of the minister cannot be made except in individual cases. No general permission contrary to canon 796, 2° is allowed.[96]

8) Canon 822, § 4 authorizes the local Ordinary and the exempt religious Superior to permit Holy Mass outside of a church or oratory in extraordinary cases whenever a just and reasonable cause exists.[97]

In the first place, it is necessary to state that canon 822, § 4 does not control the use of the privilege of a portable altar. This is controlled by § 3 of canon 822 and by whatever conditions are found in the separate rescripts.[98]

Holy Mass in a bedroom is eliminated in canon 822, § 4 from consideration. Further no general permission can be given by the Ordinary or the exempt religious Superior. Individual permission, however, can be repeated.

92 . . . ex causa tamen quam minister iustam et rationabilem iudicaverit.

93 Cf. c. 783.

94 Cf. Cappello, *De Sacramentis in genere,* etc., p. 157.

95 Sit eiusdem sexus ac confirmandus nisi aliud ministro in casibus particularibus ex rationabili causa videatur.

96 Cappello, *De Sacramentis in genere,* etc., p. 156 calls attention to the obsolete opinion of Bucceroni, etc., that if no sponsor of the same sex as the confirmed can be found, it is better to have none at all.

97 Loci Ordinarius . . . licentiam celebrandi . . . concedere potest iusta tantum et rationabili de causa, in aliquo extraordinario casu et per modum actus.

98 Hoc privilegium ita intelligendum est, ut secumfert facultatem ubique celebrandi, etc.

The power to permit Holy Mass in private homes has been officially interpreted to be used restrictively.[99] This means that the Ordinary or the Superior should be reluctant rather than willing to concede this favor. This, of course, agrees entirely with the history of the celebration of Holy Mass as can be learned from a study of the footnotes under canon 822, § 4.[100] Application of this law can be seen in a letter of the Sacred Congregation of the Sacraments to the Ordinaries of Italy and in the annotations of the secretary of this Congregation.[101]

Cappello claims that a grave cause is not necessary before permission to celebrate in a home is granted.[102] In view, however, of the statements of the Holy See this opinion is untenable. Vermeersch-Creusen suggest as an extraordinary case the advent of a special anniversary.[103] This case would seem to fulfill the conditions of canon 822, § 4.

In every event, however, the discretion of the local Ordinary or of the exempt religious Superior is final in order that the celebration of Holy Mass in a home may be licit.

9) Canon 847 permits the private carrying of the Blessed Sacrament to the sick if a just and reasonable cause exists.[104]

The public carrying of the Blessed Sacrament to the sick with appropriate ceremony is already found in a decretal of Pope Honorius III [105] where penalties are provided for disobedience. Pope Benedict XIV, however, admitted in a letter to the Ordinaries, priests and people of the kingdom of Serbia that due to the violence of the Turks, Holy Communion could

[99] P.C. October 16, 1919: cf. Bouscaren, *o. c.*, vol. I, under c. 822.

[100] Cf. c. 12, 14, D. I, *de cons;* cf. also c. 11, 15, D. I, *de cons.*

[101] Cf. Bouscaren, *o. c.*, vol. I, pp. 385-390.

[102] *De Sacramentis in genere,* etc., p. 614.

[103] *Epitome Iuris Canonici,* (Mechliniae-Rome, 1922), tom. II, p. 51.

[104] Ad infirmos publice sacra communio deferatur, nisi iusta et rationabilis causa aliud suadeat.

[105] C. 10, X, *de celebratione missarum, et sacramento eucharistiae et divinis officiis,* III, 41: cf. also Conc. Trid., sess. XIII, *de Eucharistia,* c. 6. 7.

be carried privately to the sick.[106] The reasonable cause permitted in this canon is not restricted to the frustration of expected violence. Custom in many cases, especially where Catholics are in the minority, has introduced the private carrying of the Blessed Sacrament to the sick. There is, further, no insistence in this canon on a judgment for individual cases. Hence, the Ordinary can by law determine the existence of a just and reasonable cause.

The Ordinary, not the priest who administers the Sacrament, is the judge of the reasonable cause. This is determined in a reply of the Sacred Congregation of the Sacraments.[107]

10) Canon 1109, § 2 permits the celebration of marriage at home in an extraordinary case if a just and reasonable cause exists.[108]

The judge of the reasonableness of the cause required here is the local Ordinary, not the parish priest. The gravest necessity or urgency is not demanded but no general permission can be granted for the law specifically limits the power of the Ordinary to exceptional cases. Dodwell suggests as a reasonable cause the inconvenience found in missionary places to come to the church for the celebration of marriage.[109] Any reason, however, which the local Ordinary considers sufficient can be used here for the primary prohibition is against a general release from the law demanding the celebration of marriage in a church. Attention, however, should be called to the attempt to laicize ceremonies, a practice condemned by the Holy See in an annotation to canon 822.[110]

[106] Ep. encycl., *Inter omnigenas,* February 2, 1744: *Fontes,* 339.

[107] December 16, 1927: cf. Bouscaren, *o. c.,* vol. I under c. 847: cf. also in Bouscaren the annotations of the secretary of this Congregation, vol. I, pp. 405-407.

[108] . . . in extraordinario tantum aliquo casu et accedente semper iusta ac rationabili causa.

[109] *The Time and Place for the Celebration of Marriage,* (Washington, 1942), p. 108.

[110] Cf. Bouscaren, *o. c.,* vol. I, p. 390.

11) Canon 1194 permits the local Ordinary to allow one Holy Mass in domestic oratories provided there be an extraordinary case and a just and reasonable cause exists.[111]

In this canon domestic oratories obtained through privilege are excluded.[112]

The local Ordinary in compliance with canon 1194 has no discretion in the number of Masses to be allowed in domestic oratories. He cannot, for instance, as a rule permit a Holy Mass every day. The condition of extraordinary circumstances restricts the local Ordinary's judgment. This condition is in addition to just and reasonable cause. There is, however, no prohibition against a repetition of individual permissions.

Feldhaus argues that the conditions mentioned in canon 1194 urge that the power of the local Ordinary be used sparingly.[113] There can be little doubt of this for not even one Holy Mass a day is contemplated in canon 1194. Nevertheless it must be conceded that the judgment of the local Ordinary is final. Feldhaus cites Cappello and Cocchi who admit that permissions, while limited in duration, can be renewed.[114] Feldhaus himself maintains with the common opinion that the phrase *per modum actus* can be interpreted to mean as long as the reasonable cause continues.[115]

These observations properly describe the extent of the local Ordinary's power in canon 1194.[116]

[111] . . . nonnisi unius Missae, per modum actus, in casu aliquo extraordinario, iusta et rationabili de causa.

[112] Cf. c. 1195.

[113] *Oratories,* (Washington, 1927), p. 121.

[114] *O. c., l. c.,* footnotes 8, 9.

[115] *O. c.,* p. 122.

[116] The power of the Ordinary before the Code to permit Holy Mass in a domestic oratory is amply described in Gasparri, *Tractatus Canonicus de Sanctissima Eucharistia,* (Parisiis, 1897), pp. 137-162. In these pages Gasparri gives an analysis of various decrees and decisions and differentiates between the various types of oratories.

12) Canon 1195, § 2 permits the Ordinary to allow Holy Mass in oratories on the more solemn feasts provided just and reasonable causes exist other than those for which the privilege of an oratory was conceded.[117]

Canon 1195, § 2 differs from canon 1194 in this that any reasonable cause judged by the Ordinary to be sufficient must be other than the cause for which the privilege of an oratory was conceded. Thus another restriction is placed upon the discretion of the Ordinary.[118] Here, again, no general permission to celebrate Holy Mass on the more solemn feast-days can be given.

13) Canon 1342, § 1 authorizes the Ordinary to give the faculty to preach to clerics other than priests and deacons in individual cases if a reasonable cause exists.[119]

The judgment here is clearly the Ordinary's but he is restricted to permissions to be granted in separate instances. No general permission can be given. Obviously canon 1342, § 1 refers to preaching in churches and religious assemblies. It has no reference to practice preaching in seminaries and schools.[120]

14) Canon 1402, § 2 indicates how the Ordinary is to use his faculty to permit the retention and reading of books on the Index.[121] The faculty is to be used with discrimination and with a just and reasonable cause. The text of canon 1402, § 2 which imposes these conditions is taken verbatim

117 Ordinarius vero, dummodo iustae et rationabiles causae, diversae ab eis ob quas indultum concessum fuit, etiam solemnioribus festis permittere potest per modum actus Missae celebrationem.

118 Cf. Feldhaus, *o. c.*, p. 128.

119 Concionandi facultas . . . non vero ceteris clericis, nisi rationabili de causa, iudicio Ordinarii et in casibus singularibus.

120 Cf. McVann, *The Canon Law on Sermon Preaching*, (New York, 1940), pp. 91-92, for a consideration of canon 1342 in relation to street-preaching.

121 . . . eam [facultatem] nonnisi cum delectu et iusta ac rationabili causa concedant.

from the constitution of Pope Leo XIII, *Officiorum et munerum.*[122]

Ayrinhac says the discretion of the Ordinary should extend both to persons who are to read the prohibited books and to the books prohibited.[123] This much at least is required before permission to read books on the Index is granted. But the whole tenor of the law indicates that an Ordinary should be reluctant to grant this permission. Discretion, therefore, in estimating a just and reasonable cause is further controlled by the character and type of person who asks for permission to read books on the Index.

C. *Discretion after approval of cause*

Here two canons are considered in which a reasonable cause must be approved by the Ordinary before discretion can be used. Hence, the judgment of the individual minister, or agent, is not sufficient for individual discretion to be operative. Naturally, emergencies do not fall under this consideration.

1) Canon 735 permits the retention of the Holy Oils at home if necessity or some reasonable cause exists. The permission of the Ordinary is necessary.[124]

Kilker properly suggests that inconvenience incident to procuring the Holy Oils when an occasion arises for their use must be judged by individual circumstances.[125] Thus distances may vary as well as opportunities. The controlling factor is the necessity absolute or relative of obtaining the Holy Oils within sufficient time for their use. Personal inconvenience due to effort required to take the Holy Oils from the church is not a reasonable cause. As Kilker observes, this reason has been rejected several times by the Holy See.[126]

[122] January 25, 1897: *Fontes,* 632, no. 25.

[123] *Administrative Legislation,* (New York, 1930), p. 299.

[124] . . . nec ea [olea sacra] domi retineat, nisi propter necessitatem aliamve rationabilem causam, accedente Ordinarii licentia.

[125] *Extreme Unction,* (Washington, 1926), p. 340.

[126] *O. c.,* pp. 338-339: cf. also Kilker's discussion of the custom in the United States of retaining the Holy Oils at home; p. 340.

The approval of the Ordinary can be given for an extended time. There is no clause in canon 735 limiting approval to one or the other occasion.

2) Canon 1386, § 2 forbids even laymen to contribute to newspapers and magazines which are wont to attack the Catholic religion unless a just and reasonable cause approved by the local Ordinary exists.[127]

The text of canon 1386, § 2 is found basically in the constitution, *Officiorum ac munerum.*[128] The approval of the local Ordinary, however, is not found in the pertinent paragraph of this constitution.[129]

Ayrinhac suggests as a reasonable cause the necessity of answering a false accusation, of correcting a wrong impression or of presenting the Catholic side of a question. Other reasons could be relative to serious business interest, etc.[130]

Both Ayrinhac and Vermeersch-Creusen admit the Ordinary's permission can be presumed in urgent cases.[131]

D. *Discretion after consultation*

Only one canon is to be studied in this section.

Canon 859, § 1 permits one to defer the reception of the Holy Eucharist at Easter for a reasonable cause after consultation with one's own priest.[132] Vermeersch-Creusen say either the pastor or the confessor is competent to give advice even outside of confession.[133]

[127] In diariis vero, . . . nisi iusta ac rationabili causa suadente, ab Ordinario loci probata.

[128] January 25, 1897: *Fontes,* 632, § 22; Nemo e catholicis, praesertim e viris ecclesiasticis, in huiusmodi diariis, vel foliis, vel libellis periodicis, quidquam, nisi suadente iusta et rationabili causa, publicet.

[129] For approval of publications, in so far as they come from the secular clergy, cf. § 42 of this constitution: cf. also canon 1386, § 1.

[130] *O. c.,* pp. 281-282.

[131] Ayrinhac, *o. c.,* p. 282: Vermeersch-Creusen, *o. c.,* tom. II, p. 395.

[132] . . . nisi forte de consilio proprii sacerdotis, ob aliquam rationabilem causam, ad tempus ab eius perceptione duxerit abstinendum.

[133] *O. c.,* tom. II, p. 72-73.

The judgment, however, should remain with the faithful not with the pastor or confessor.[134]

The pertinent text of canon 859, § 1 is found almost verbatim in a decretal of Pope Innocent III [135] and it has been repeatedly the subject of official notice. The first notice available is a letter of Pope Eugene IV who said that Paschal Communion did not mean Communion precisely on the feast of Easter.[136] Pope Benedict XIV admitted reasons of distance and locality as reasonable causes for deferring Paschal Communion [137] while a decree of the Holy Office admitted any legitimate impediment or grave danger.[138]

It is to be noted that in this canon the advice of the proper priest is demanded not his consent.[139]

E. *Discretion without a suggested example in the pertinent canons*

Two canons permit deviation from the law whenever a reasonable cause exists without suggesting an example of such a cause. This is not to be taken as intimating that all other canons where a reasonable cause is mentioned suggest examples of such a cause. Rather what is meant is that the two canons allow considerable latitude in estimating a reasonable cause.

These two canons could have been studied earlier where discretion without qualification in the text of the pertinent canon was considered. But it was deemed better to study them separately especially in contrast to the canons in the

[134] Vermeersch-Creusen oppose this view since they consider the advice of the priest as a quasi-dispensation: cf. *o. c.*, tom. II, p. 73.

[135] C. 12, X, *de poenitentiis et remissionibus*, V, 38: nisi forte de proprii sacerdotis consilio ob aliquam rationabilem causam ad tempus ab huiusmodi perceptione duxerit abstinendum.

[136] Ep. *Fide digna; Fontes*, 53.

[137] Ep. encycl., *Inter omnigenas*, February 2, 1744; *Fontes*, 339.

[138] S.C.S. Off., March 23, 1656; *Fontes*, 730: cf. also *Fontes*, 741.

[139] Cf. Cappello, *De Sacramentis in genere*, etc., p. 344.

last part of this article where canons with suggested examples of reasonable causes are considered.

1) Canon 947, § 3 authorizes the omission of the anointing of the feet in the administration of Extreme Unction whenever a reasonable cause exists.[140]

The judge of this reasonable cause is the minister of the Sacrament. He is guided by his discretion and considerable freedom is permitted his judgment. Hence, every real reason of inconvenience either to the patient, his attendants and even to the minister himself can be considered a reasonable cause. It should not, however, be thought that it is optional to make this anointing. This is not the meaning of canon 947, § 3.

It should, therefore, be unnecessary to state that the minister of the Sacrament of Extreme Unction cannot make it a rule never to anoint the feet of the subject of this Sacrament. While great latitude is permitted to the discretion of the minister, every case must be considered in the light of its own circumstances. Once, however, discretion is used, there is no need for anxiety.

2) Canon 1030, § 1 demands that a period of three days after everything is ready for marriage elapse before the ceremony is performed unless a reasonable cause exists for an earlier celebration of marriage.[141]

The judge of this interval is the pastor. However, the reasonable cause advanced for the earlier celebration of marriage will for the most part be derived from the urgency of the parties to be married. But inconvenience on the part of the pastor is not to be disregarded. Such inconvenience may occur if the pastor foresees that he will not be on hand on the day when the marriage should take place.

The reason for the delay indicated in canon 1030, § 1 is obviously to provide an opportunity for objections to the

140 Unctio pedum ex qualibet rationabili causa omitti potest.

141 . . . nisi rationabilis causa aliud postulet, tres dies decurrerint ab ultima publicatione.

marriage contemplated. As Roberts observes, this delay is a new regulation in the general law.[142] Since, however, earlier publications of banns had not resulted in the discovery of impediments, any reasonable cause either on the part of the pastor or from the disposition of the persons to be married will be sufficient to shorten or eliminate this delay of three days.[143]

F. *Discretion with suggested examples in the pertinent canons*

Two canons contain examples of how discretion is to be used. Both canons are found in the penal legislation of the Church.

1) Canon 2267 acknowledges generally any reasonable cause as excusing from the prohibition to associate with an *excommunicatus vitandus.* The examples of association mentioned in this canon are consorts, parents, children, servants and subjects.[144]

The elimination of the minor excommunication formerly attached to the association with an *excommunicatus vitandus* did not imply a removal of the prohibition to associate.[145] Necessities, however, both absolute and relative, have always been recognized as excuses from this prohibition.[146] Similar necessities, and now in the milder legislation, even utilities will furnish a reasonable cause for association. Such utilities can be temporal or spiritual affecting the excommunicated person or anyone else.[147] Coronata says the prohibition to

[142] *The Banns of Marriage,* (Washington, 1931), p. 118.

[143] Cappello, *De Matrimonio,* (Taurinorum Augustae, 1923), p. 202, says any cause, even a light one, is here a reasonable excuse.

[144] . . . nisi agatur de coniuge, parentibus, liberis, famulis, subditis, et generatim nisi rationabilis causa excuset.

[145] Cf. S.C.S. Off., August 2, 1893: *Fontes,* 1166.

[146] C. 34, X, *de sententia excommunicationis,* V, 39.

[147] Cf. Sole, *De Delictis et Poenis,* (Romae, 1920), p. 166.

associate is not a grave obligation and that any just cause, even a light one, will be an excuse.[148] Vermeersch-Creusen mention that students can attend the lectures of *excommunicati vitandi,* librarians can honor their patronage, merchants can sell to them and contracts of rent can be made with them.[149] From all this it can be gathered that the discretion of the one who for a sufficient reason must associate with an excommunicate is to be followed. No permission or approval of reasons is required.[150]

2) Canon 2299, § 1 says that a cleric possessing a removable benefice can be poenally removed for a reasonable cause in addition to those causes which can be used to dispossess an irremovable cleric.[151] Coronata indicates the canons in which either the law imposes an immediate penalty or indicates that the penalty of deprivation from office is to be imposed.[152] Vermeersch-Creusen maintain that a cause named in canon 2147 [153] can be used for penal removal from a benefice.[154]

The judgment concerning the reasonable cause in canon 2299, § 1 is the Ordinary's. Equity, however, must be followed according to the prescription of canon 192, § 3 but the same consideration necessary in administrative removal [155] cannot in all points be urged in penal removal. Naturally, recourse against a too severe penalty is always possible.

148 *Institutiones Iuris Canonici,* (Taurini, 1935), vol. IV, p. 212.

149 *Epitome Iuris Canonici,* (Mechliniae-Romae, 1936), tom. III, p. 282.

150 Cf. Noldin, *De Poenis Ecclesiasticis,* (Oeniponte, 1912), p. 47, for penalties for association without cause.

151 Si clericus beneficium inamovibile obtinet, eodem in poenam privari potest solum in casibus iure expressis; si amovibile, etiam ob alias rationabiles causas.

152 *O. c.,* vol. IV, p. 259.

153 E. g., § 2, 3°. Bonae existimationis amissio . . . ex levi vivendi ratione parochi, etc.

154 *O. c.,* tom. III, p. 299.

155 . . . naturali aequitate servata.

In all the foregoing canons, an attempt has been made to indicate how the term "rationabilis" is to be interpreted. In the first part of this article, this term has been considered in reference to the whole *Code of Canon Law;* in the second part, the immediate meaning of this term in the separate canons has been investigated. It has also been pointed out whose judgment prevails in estimating the force of the term "rationabilis". In these matters, as in all points relative to Canon Law, it is obviously of the utmost importance to know precisely how a term is to be understood.

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NO CENSUS QUESTION ON RELIGIOUS AFFILIATION

The Director of the United States Bureau of the Census has definitely stated that the census takers will ask no question regarding religious affiliation in taking up the 1950 census. The reasons assigned were that many persons would consider questions on this subject as an infringement of their constitutional rights as to religious freedom and the fear that the resultant resentment might cause inadequate answers not only to the precise question affecting religion but also to other questions responses to which are highly desirable in order to obtain the basic statistical data needed for the census.

DIVORCE—SOME PRACTICAL CANONICAL CONSIDERATIONS*

IT would be laboring the obvious to dwell upon the enormity of the evil of civil divorce in the United States today, for there is no one who does not know how widespread is this cancerous growth which is eating away the very foundation of Christian Society. It would also seem to be unnecessary to call attention to the number of Catholics in this country who are daily apearing before the judges of the civil courts seeking the civil dissolution of their marriage bond, for who is there who does not reckon many divorced Catholics among his acquaintances. Nor need I take time to describe the thoroughly secularist mentality which has taken possession of innumerable American Catholics with regard to marriage, and which has caused them to have such confused and perverted notions on this subject. All of these things are too well known to need amplification.

Nor need I dwell upon the duty of the Bishops and priests of the Church to proclaim fearlessly and without equivocation the law of God and the divinely revealed doctrine taught by Christ and handed down through the centuries by His Church. Canon 1322 of *The Code of Canon Law* makes this obligation clear when it states:

> § 1. Christ Our Lord has entrusted to the Church the Deposit of Faith in order that She, with the ever-present assistance of the Holy Spirit, may safely preserve and faithfully expound the revealed Doctrine.
>
> § 2. It is the right and duty of the Church, independently of any civil power, to teach all nations the Doctrine of the Gospels and all the members of the true Church of God are obliged by the Divine Law to acquire a proper knowledge of this Doctrine.

* Paper read October 12, 1949, before The Canon Law Society of America at its meeting in Cincinnati, Ohio.

It is evident, therefore, that it is our duty to bring to the knowledge of all men the teaching of Our Divine Master on the sacred character and indissolubility of Christian Marriage.

It is the purpose of The Canon Law Society of America, according to its constitution, "to stimulate a more general clerical interest in canonical law and to insure a more profound application of its principles in practical life." To carry out this provision of the constitution the officers of the Society, convinced of the tremendous practical importance of the matter, placed this subject on the program of this meeting, because they felt that no persons are better qualified than the members of this Society to lead a movement to correct the grave public evil of civil divorce which is so rampant today even among Catholics. Too often it has been said that Canonists concern themselves almost exclusively with what may be called for lack of a better word the technicalities of the law at the expense of the wider and more important aspects of it. This paper should be an answer to that charge, for it will contain less Canon Law in the technical sense than is usually found in the papers read at the meetings of this Society, and it is given in the hope that it may stir up at least the beginnings of a "more profound application of the principles of canonical law in practical life." It is the purpose of this paper, therefore, merely to suggest some practical measures to counteract the deplorable conditions which exist today among Catholics with regard to marriage and civil divorce.

Before making any suggestions it might be useful, for the sake of clarity, to state briefly the doctrinal and juridical position of the Church on marriage and its dissolution, as well as on the competence of the Church and the State with regard to these matters.

Position of the Church

As is well known, it is the constant and age-old teaching of the Church that every marriage (between baptized or between unbaptized persons) is, by Divine Law, indissoluble,

although, as Our Most Holy Father Pius XI, of happy memory, stated in his encyclical letter on Marriage, "not in the same perfect measure in every case." On this point His Holiness declared:

> "And this inviolable stability, although not in the same perfect measure in every case, belongs to every true marriage, for the word of the Lord: 'What God hath joined together let no man put asunder', must of necessity include all true marriages without exception, since it was spoken of the marriage of our first parents, the prototype of every future marriage. Therefore, although, before Christ, the sublimeness and the severity of the primeval law was so tempered that Moses permitted to the chosen people of God, on account of the hardness of their hearts, that a bill of divorce might be given in certain circumstances, nevertheless, Christ, by virtue of His supreme legislative power, recalled this concession of greater liberty and restored the primeval law in its integrity by those words which must never be forgotten, 'What God hath joined together let no man put asunder.'"[1]

It is evident from the words of the Holy Father that the Divine Law of Indissolubility admits of exception, and from the practice of the Church we know that these exceptions are two in number:

1) the dissolution of the unconsummated bond of marriage by religious profession or by Pontifical Dispensation;[2] and
2) the dissolution of the non-sacramental bond of marriage by the Pauline Privilege or by Pontifical Dispensation.[3]

Accordingly, *The Code of Canon Law,* in Canon 1118, states the matter as follows: "The valid and consummated marriage

[1] Pius XI, encycl., "*Casti connubii*", 31 dec. 1930—*AAS,* XXII (1930), 539-592. Translation by the writer.

[2] Canon 1119.

[3] Canon 1120 and S.C.S. Off. 5 nov. 1924 (private to Bishop of Helena) in Bouscaren, *The Canon Law Digest,* I (Milwaukee: Bruce Publishing Co., 1934), 553.

of baptized persons can be dissolved by no human power and for no cause other than death."

Competence of the Church and the State

However, the power to dissolve these unconsummated or non-sacramental marriages does not belong to the civil authority. This power belongs *solely* and *exclusively* to the Church, for the Church of Christ alone has been established by God to be the Guardian and Interpreter of the Divine Law. Hence Pius XI, quoting his predecessor, Pius VI, continued:

> " . . . . 'Hence it is clear that marriage even in the state of nature, and certainly long before it was raised to the dignity of a sacrament, was divinely instituted in such a way that it should carry with it a perpetual and indissoluble bond which cannot therefore be dissolved by any civil law. Therefore although the sacramental element may be absent from a marriage, there must remain, and indeed there does remain, that perpetual bond which by divine right is so bound up with matrimony from its first institution that it is not subject to any civil power.'"[4]

The civil authority, therefore, in every nation, has absolutely no competence to dissolve the bond of marriage existing between any man and woman, be they baptized or unbaptized. When the civil authority attempts to do this by granting a civil divorce, it violates the Law of God, it usurps the jurisdiction of the Church, and it performs a juridical action which is null and void in reality and before God. The Church of God alone, as the Guardian and Interpreter of the Divine Law, has exclusive competence and jurisdiction to dissolve both the natural contract of marriage between unbaptized persons and the sacramental but unconsummated contract of marriage between baptized persons. This is the clear and unequivocal position of the Church which has not changed one jot or tittle in twenty centuries from Peter to Pius XII.

[4] Pius XI, encycl., "*Casti connubii*", 31 dec. 1930—*AAS*, XXII (1930), 539-592. Translation by the writer.

Cognizant of this position, the Bishops of the United States gathered in Plenary Council in Baltimore in 1884 decreed:

> "It is manifestly evident that they are guilty of grave sin who seek to have their marriages dissolved by a civil magistrate; and that it is even a graver sin if, having obtained a civil divorce, they attempt to enter a 'new marriage' while the bond of their true marriage still exists, to which they are held before God and the Church. To curb these crimes, we impose the penalty of excommunication, reserved to the Ordinary, and incurred *ipso facto* on those who, after they have obtained a civil divorce, dare to attempt another 'marriage.'" [5]

The doctrinal and juridical position of the Church therefore is clear, forthright and indubitable; and yet thousands upon thousands of Catholics are today spurning the teaching and the law of the Church by asking the civil authorities to dissolve the bond of marriage existing between them. What can be done to counteract this evil?

Suggested Remedies

I hope I will not be regarded as presumptuous if I make bold to offer some practical suggestions to remedy this situation. No *one* of these suggestions, by itself, would seem to be sufficient to extirpate this evil among our Catholic people, but perhaps all of them together, adapted to the varying circumstances of different places, will curb, to some extent at least, this malignant growth which is destroying the home, weakening the nation, causing terrific leakage in the Church, and bringing about the loss of so many souls.

Educational Program

The first suggestion I would offer is that there be conducted on a national scale an intensified educational program by means of pastoral letters, prescribed Sunday sermons, radio talks, and a required course given by a priest in Catholic high

[5] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii*, n. 124. Translation by the writer.

schools and colleges, study clubs and parish societies on Christian marriage, its sacred character, and its indissolubility. This program should consist of two parts—dogmatic and moral. In the course of this program full and complete instruction on Christian Marriage should be given but, in my judgment, particular emphasis should be placed on the following dogmatic and moral propositions.

On the dogmatic side, emphasis should be placed on the following four tenets of Catholic teaching and their consequent corollaries:

1) Marriage was instituted by God and its nature and character determined by Him. Therefore the marriage contract cannot be changed by men to suit their whims or the varying circumstances of time and place.[6]

2) God has decreed that every marriage (whether the parties be Catholic or non-Catholic, baptized or unbaptized) is a permanent union which lasts until death. Since this is the law of God it binds all men, regardless of their religious conviction or lack of conviction. Therefore the civil authority has no right to grant a divorce to anyone (Catholic or non-Catholic, baptized or unbaptized), and people who have obtained only a civil divorce are still husband and wife before God even if living with someone else after having gone through a second ceremony of "marriage."[7]

3) The marriage of any two baptized persons (Catholic or non-Catholic) is a Sacrament, and all of the Sacraments, including the Sacrament of Matrimony, have been placed by God within the jurisdiction of the Catholic Church. The Catholic Church therefore has sole and exclusive competence to legislate for and pass judgment upon the marriages of all baptized persons. The civil authorities have the right only to make regulations concerning the civil effects of the marriage of baptized persons. Therefore the civil authorities have no right to create impediments for or to grant annulments for the marriage

[6] Cf. Pius XI, encycl., "*Casti connubii*", 31 dec. 1930—*AAS*, XXII (1930), 539-592.

[7] Cf. Pius XI, *loc. cit.*

of any baptized persons, whether they be Catholic or non-Catholic. This is a point which must be emphasized because many Catholics, realizing that it is wrong to seek a divorce, think that it is perfectly permissible to seek a civil annulment or, having obtained a *civil* annulment, think that their marriage is null before God.[8]

4) The consummated marriage of any two baptized persons is absolutely indissoluble by any human power. This is not a Church law but the law of God, and it affects not only Catholics but baptized non-Catholics as well.[9]

These four dogmatic propositions we think should be emphasized because they seem to strike directly at the false notions which many Catholics entertain on these subjects.

On the moral side, particular emphasis should be given to the following principles and rules of conduct:

1) Everyone commits a grave sin in seeking a civil divorce. In addition, Catholics are excommunicated if they attempt another marriage after obtaining a civil divorce.[10]

2) Every man or woman commits a grave sin in "keeping company" or constantly "going out" with a divorced person of the opposite sex, whether the divorced person be a Catholic or a non-Catholic. Absolution cannot be given to Catholics unless they give up their association with such divorced persons.[11]

3) Every married person is obliged by the contract of marriage to live a common life with his spouse. Therefore husbands and wives cannot separate by mutual agreement or on their own authority unless there is grave danger to soul or body in living together and there is not time to put the matter before the proper ecclesiastical authority. Catholics who separate by mutual agreement or on their own authority, where there is no such urgent danger, commit a grave sin and cannot

[8] Canons 1012 and 1016.

[9] Canon 1118.

[10] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii,* n. 124.

[11] Noldin-Schmitt, *Summa Theologiae Moralis,* I (ed. 1945), n. 326.

be absolved unless they return to their spouse or bring the matter to their Bishop and agree to abide by his decision.[12]

4) Catholics, while observing the divine precept of charity, and the ethical requirements of ladies and gentlemen, must not so conduct themselves in their association with divorced and "remarried" people (non-Catholics as well as Catholics) as to give the impression that their state of "public sinner" is condoned or minimized. The rules of conduct, given by Father Connell in recent articles in the *American Ecclesiastical Review*, would seem to be sound and practicable and should be put into effect. With regard to priests, Father Connell suggests:

(a) "The priest may visit the home of such a couple for some business of an official nature . . . . But he should avoid purely social visits. . . ."

(b) "Any public announcement designating the couple as husband and wife must be avoided when it is publicly known that they are invalidly married."

(c) "If the couple (or either one) attends Mass, no objection should be made by the priest and he can even greet the individual or the couple courteously. . . ."

(d) "A Catholic who is publicly known to be living in an invalid conjugal union cannot be admitted to membership in any association under the auspices of the Church, such as the sodality or the altar society. The mind of the Church is quite clearly expressed on this point by the Code, which declares that public sinners cannot be received validly into religious associations of the laity (Can. 693, § 1)."

With regard to lay Catholics, Father Connell gives the following general principles:

(a) "Purely business relations with divorced persons are ordinarily permissible."

(b) "Purely social relations with a couple, one (or each) of whom is known to have a previous spouse still

[12] Canons 1128-1132; *Acta et Decreta Concilii Plenarii Baltimorensis Tertii*, n. 126.

living, should be avoided by Catholics or at least reduced to the minimum."

(c) "Apart from most unusual circumstances, a Catholic would not be permitted to be present at the attempted 'remarriage' of a divorced person (nor, *a fortiori*, to act as bridesmaid, best man, etc.), knowing full well that such a union is invalid in the sight of God. Such attendance would ordinarily be gravely scandalous."[13]

These moral principles should be emphasized because many Catholics today seem to have lost sight of them completely and do not even regard themselves as guilty of wrong-doing in acting against them.

This educational campaign must be a long-term program because the confused and perverted notions held by Catholics with regard to marriage and divorce and the competence of the Church and the State over these matters are very deep rooted and widespread. The cure cannot be effected in a week, a month, or a year, nor by one pastoral letter nor one course of sermons. The campaign must be prolonged and consistent, and made a permanent part of the training of the youth if it is to accomplish its purpose.

Control of Separations

The second suggestion to extirpate the evil of civil divorce among Catholics is that the Church take the practical measures necessary to control the very separation of Catholics before the home is broken up and before a civil divorce or any legal civil action is taken or even contemplated by either party. This is most necessary for it strikes at the very root of the problem. If we can prevent Catholic husbands and wives from separating, we can prevent them from eventually obtaining a civil divorce. Sentimentalism and partisanship by priests must be carefully avoided in this matter, and the problem approached juridically and from the viewpoint of the

[13] *American Ecclesiastical Review*, CXIX (n. 3, Sept. 1948), 217 seq., CXVIII (n. 4, April 1948), 307.

common good rather than the individual good of the parties concerned in a particular case.

The Code of Canon Law, as well as the Council of Trent and the pronouncements of many Popes, places a grave obligation on married persons "to observe the communion of conjugal life." "Conjuges servare debent vitae conjugalis communionem", states the Code.[14] This "communion of conjugal life" means not only actual cohabitation under the same roof but a mutual sharing in each other's lives and possessions. This "communion of conjugal life" cannot be broken except for the reasons and under the conditions stated in the Code. A permanent separation from bed, board and cohabitation therefore cannot be allowed to Catholics for any cause other than adultery, and then only under the conditions explicitly set down in Canon 1129. A temporary separation, to last only as long as the cause perdures, may be allowed for a variety of reasons but, again, only under the conditions stated in Canon 1131. Now all of these sacred canons on "separation from bed, board and cohabitation" presuppose that the local Ordinary makes the judgment on whether or not the requirements of the law have been fulfilled in the individual case. The parties may be the judge in their own case only when the crime of the consort "is certain and there is danger in delay."[15] This danger, the Sacred Roman Rota has declared, must be a grave and urgent danger to soul or body.[16] It is evident therefore, from the law and practice of the Holy See, that Catholics are gravely prohibited from separating by mutual agreement or on their own authority (except in an emergency) and that the local Ordinary is expected to pass judgment on the cases of Catholic consorts who wish to separate from each other. These prescriptions of the law must not

[14] Canon 1128; Conc. Trident., sess XXIV, *de matrimonio,* can. 8; Eugenius IV, const. *"Exultate Deo",* 22 nov. 1439, § 16—*Fontes,* I, n. 52; Benedictus XIV, ep. *"Nuper ad nos",* 16 mart. 1743—*Fontes,* I, n. 335.

[15] Canon 1131, § 1.

[16] *S. Rom. Rotae Decisiones,* XXII (1930), Dec. XLVII, nn. 2 and 4; cf. also Vol. II (1910), Dec. XXIV, n. 11.

only be made known to Catholics, as we have advocated above, but there must be provided the practical canonical machinery and personnel for handling cases of separation, since it is obvious that the Ordinary himself has not the time to do so.

Cases of separation from bed, board and cohabitation may be handled judicially or administratively but, in either case, both parties should be heard and proof of the cause alleged for the separation, other than the word of the parties themselves, must be obtained. Of course the first obligation of the judge or delegate of the Ordinary in such cases is to try to compose the differences between the parties and seek to effect a reconciliation. Only when there is no hope whatever of effecting such a reconciliation should he proceed to examine into the merits of the case. The practical details of handling these cases must be worked out according to circumstances. Perhaps the priest (or priests) delegated by the Ordinary for the purpose of passing upon the separation of Catholic consorts could also be given wider scope and designated as "Marriage Consultant", to whom parish priests, after they have failed to solve the problem, could refer people who were running into marital difficulties although not yet seeking a separation. It might be well also if the services of a medical doctor, a Catholic psychiatrist and a social worker were made available to the "Marriage Consultant" in cases in which the services of these specialists were deemed helpful. Some method also should be devised whereby the parties pledge themselves to abide by the decision of the Church authority, and failure to do so afterward should be punished at least by denial of absolution, if not by censure, or by the vindictive penalty of denial of Christian Burial.

Everyone knows that there is no more difficult, thankless, and tedious job than trying to settle disputes between husband and wife; and yet the law of the Church and the good of souls demand it, so it must not be shirked. Moreover, there is no other way in which the Church can win back, in the

minds of our Catholic people, her rightful role as the divinely appointed possessor of exclusive jurisdiction over the sacramental bond of marriage. It is only by the exercise of this jurisdiction that we can prevent Catholics from bringing their marital difficulties before the civil judge and eventually obtaining a civil divorce with its usual consequence of an adulterous union with a third party.

Uniform Discipline in Granting Permission to Catholics to Seek a Civil Divorce

Although the State has no authority to grant a divorce to anyone (Catholic or non-Catholic), yet practically every modern State has usurped the jurisdiction of the Church in this matter and Catholics must live under these civil governments. While still protesting the right of the State to grant a divorce, it may sometimes be necessary therefore for a Catholic to seek a civil divorce in order to contract a marriage to which he is rightly entitled, or in order to protect his property from unjust acquisition by an unworthy consort, or otherwise to protect his civil rights. It may be asked, therefore, when and under what conditions may a Catholic be permitted to seek a civil divorce. It is obvious that no Catholic may seek a civil divorce without first obtaining the permission of the Holy See, or at least of the local Ordinary.[17] But when may such permission be granted?

As my third suggestion to curb the evil of divorce, I would recommend that a uniform and strict discipline be adopted on this matter and that this permission be granted only under the following circumstances:

1) If the marriage to be dissolved civilly, is null or dissoluble according to the natural law or the Canon Law, permission to obtain a civil divorce should be granted to Catholics only after the marriage in question has been declared null by due canonical process, or after it has been dissolved by the Holy

[17] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii,* nn. 124 and 126.

See, or after the Ordinary has determined that the conditions required for the use of the Pauline Privilege are present.

2) If the marriage to be dissolved civilly is a valid and indissoluble bond, this permission to obtain a civil divorce should not be granted to a Catholic except when the following conditions are verified:

(a) The Catholic has obtained an ecclesiastical decree of *permanent* separation because of the adultery of his spouse, for this is the only canonically recognized "just cause" for permanently severing the "communion of conjugal life" which is a mutual sharing in each other's possessions. Since a civil divorce permanently "dissolves" the bond of marriage under the civil law and does away with all civil effects flowing from that bond, (although really and before God the bond remains), it would seem that a Catholic cannot in justice permanently disinherit or dispossess his spouse, no matter how unworthy he or she may be, unless that spouse is guilty of adultery and the conditions mentioned in Canon 1129 are verified.

(b) The Catholic can obtain the protection of the civil law in no other way than by a civil divorce. If this same protection of the civil law can be obtained by separation from bed, board and cohabitation or by a mutual agreement on property rights, or by some other means, permission should not be granted to a Catholic to seek a civil divorce.

(c) There must be present a cause, other than the mere private advantage or protection of property rights, before a Catholic may be granted permission to seek a civil divorce, and this cause must be proportionate to the evil. Since the evil of civil divorce is an evil of the public order, this cause must be one of the public or supernatural order if it is to be proportionate to the evil. It is difficult to discover a public cause for allowing a Catholic to seek a civil divorce, but a supernatural cause would be the rescuing of children

from the custody of a non-Catholic or unworthy parent.

(d) The Catholic must declare, under oath and before the Ordinary or his delegate and two witnesses, that he does not recognize the authority of the State to dissolve the bond of marriage, and that he is seeking this civil divorce merely for the civil effects which will flow from it.

(e) The Catholic must solemnly promise that he will not attempt another union during the lifetime of his true spouse.

(f) In view of all of the circumstances of the case, no scandal will arise from the granting of permission to this Catholic to seek a civil divorce.[18]

It seems to us that only under these conditions may a Catholic be rightfully granted permission to seek a civil divorce, if the bond of a valid and indissoluble marriage exists between him and the consort whom he wishes to divorce.

This severe and uncompromising policy must be adopted uniformly throughout the country so that Catholics everywhere will come to learn that there are no exceptions to this rule no matter where they happen to be, else the campaign to root out the evil will lose its force.

Prohibition on Catholic Lawyers

The fourth suggestion I would offer, to overcome the present evil, is that an explicit instruction be issued requiring Catholic lawyers to obtain the permission of the local Ordinary before agreeing to represent any client (Catholic or non-Catholic) who wishes to obtain a civil divorce. If the client is a Catholic, permission should not be given to a Catholic lawyer to represent him in an action for civil divorce unless the Bishop has already granted permission to the Catholic client to seek the divorce in accordance with the conditions

[18] Whenever the Holy See has granted permission to a Catholic to seek a civil divorce, the rescript invariably contains the last three conditions (d-e-f-).

mentioned above. If the client is not a Catholic, permission may be granted to a Catholic lawyer to seek a civil divorce for his client if it is apparent that the marriage to be dissolved civilly is null and void according to the natural law or according to the Canon Law. However, if the marriage appears to be a valid and indissoluble bond, permission should not be granted to the Catholic lawyer to seek a civil divorce even for a non-Catholic client except under the following conditions:

(1) The cooperation of the Catholic lawyer is not formal cooperation but merely material (i.e. he does everything possible to dissuade his client from seeking the divorce and explains to him that the civil divorce does not really dissolve the bond of marriage which exists between him and his consort before God).

(2) There exists a proportionately grave reason of the public or supernatural order requiring this Catholic civil lawyer to act.

(3) No scandal will arise by reason of the Catholic lawyer acting in this case.[19]

Adjustments in the Civil Law

The final suggestion I have to offer is that the State law in each locality be examined, and if necessary revised, so that the same juridical effects may be obtained from a civil decree of separation from bed, board and cohabitation as from a civil divorce. Thus Catholics who have obtained an ecclesiastical decree of separation may obtain the same protection for their civil and property rights by seeking a civil decree of separation rather than a civil divorce. There would hardly ever be

[19] Gasparri, *Tractatus Canonicus de Matrimonio,* (2. ed., 2 vols., Romae: Typis Polyglottis Vaticanis, 1932), II, nn. 1310-1311; Genicot-Salsmans, *Institutiones Theologiae Moralis,* II, n. 562; The Jurist, VI (n. 2, April 1946). It should be noted also that the Holy See has declared that "it can be tolerated" that a Catholic lawyer act in behalf of the *defendant* in a civil divorce action when the defendant is *opposing* the petition for the civil divorce (Cf. S.C.S. Off., 22 maii 1860, quoted by Gasparri, *De Matrimonio,* (ed. 1932), II, n. 1312.

any reason then for a Catholic to seek a civil divorce unless he intended to attempt an adulterous union.

The reason civil lawyers do not recommend this procedure for Catholic clients, even in States where a civil separation can be obtained, is because frequently a malicious consort, after his innocent spouse has lawfully obtained a decree of separation, will obtain a divorce in another state and thus void any property settlement or financial support to which he was obliged by reason of the decree of separation. To counteract this move, it has been suggested that adultery be recognized explicitly by the State law as a ground for separation. The innocent spouse, then, could obtain a civil as well as an ecclesiastical decree of separation from bed, board and cohabitation because of the proved adultery of the other, and this civil decree of separation for this cause would almost certainly act as an estoppel to any suit for divorce which the guilty spouse might seek in another State on a less serious charge, such as desertion or mental cruelty.

Another Possible Remedy

Another remedy which might be offered to help curb the evil of divorce among Catholics is to make separation without ecclesiastical permission, or the securing of a civil divorce without ecclesiastical permission, a reserved sin. However, ordinarily this would not seem to be particularly effective, for it may be seriously doubted that such a course will deter Catholics from separating or securing a civil divorce. In most cases the layman does not know of the reservation until after the crime is committed, and even if he is informed of it before separating, or before securing a divorce, usually at that time he is not concerned with obtaining forgiveness for his contemplated sin, but is rather absorbed in his real or imaginary marital difficulties and feels perfectly justified in separating or obtaining a divorce.

The same objection may be offered to the proposal to attach a censure to the sin of separating without ecclesiastical permission or the sin of seeking a divorce without permission.

Moreover, it is contrary to the spirit of the law to multiply censures in the same matter, and the III Plenary Council of Baltimore has already attached an *ipso facto* censure of excommunication reserved to the Ordinary on the closely related crime of attempting marriage after a civil divorce. Furthermore, from a practical viewpoint I do not think that this has deterred many Catholics from attempting another marriage after having obtained a divorce in the years which have intervened since 1886, when this censure was promulgated. For these reasons I do not recommend either of these courses of action as a remedy against the present evil. However, in some circumstances it may appear to be helpful to make separation, or the securing of a civil divorce, without ecclesiastical permission, a reserved sin or the subject of censure, and, of course, it is within the power of the local Ordinary to do so. It is likewise within his power to attach to either or both of these sins the vindictive penalty of deprivation of Christian Burial, if he thinks that the infliction of this penalty would help root out these evils.[20]

Conclusion

We are keenly conscious that there are many factors—economic, social, educational and religious—which are causing the break-up of American homes, the separation of Catholic husbands and wives, and their subsequent resort to the divorce courts. We realize fully the godlessness, the secularism, and the almost complete absorption with material things which are so rampant in American life, and we know how many other evil influences there are which are de-christianizing the home and destroying the religious sense even of Catholics. We appreciate also how all of these things play a part in creating the deplorable conditions with regard to marriage and its indissolubility which exist today.

We do *not maintain* that the adoption of the remedies which we have advocated will completely root out the evil of civil divorce among Catholics, for we are fully aware that many

[20] Canons 2221 and 2291.

remedies other than those which we have suggested must be applied in order that the fundamental causes of this evil be corrected. But if a fervent and intensive educational campaign were begun, to make known, particularly to Catholics (but also to non-Catholics), the teaching of Christ and the position of the Church on the sacred and indissoluble character of Christian Marriage; and if the very separation of Catholic consorts were supervised and controlled by the Church according to the norms of Canon Law; and if a strict and uniform discipline were adopted with regard to Catholic plaintiffs and Catholic lawyers seeking a civil divorce; and if the State Law would give the same protection for property rights to a separated consort as is given to a divorced spouse, *we do think* that a Christian offensive would be launched and the start of a counterattack made on the modern paganism which is infiltrating itself into the minds of so many Catholics and causing them to have such perverted and confused ideas on marriage and the authority of the Church and the State over it. *We do maintain* that the adoption of these concrete and practical suggestions will prove to the world that the Church of Christ is still faithfully expounding the revealed doctrine entrusted to Her by Her Founder, and that She is fearlessly fulfilling, independently of any civil power, Her duty to teach all nations the evangelical doctrine of Christ. *We do claim* that the adoption of these proposals will be evidence that The Canon Law Society of America, in fulfillment of its purpose as expressed in its constitution, is not only "stimulating a more general clerical interest in canonical law" but is doing its utmost "to insure a more profound application of the principles of canonical law in practical life." And we feel certain that with the help of God these remedies, while working a hardship on some, will nevertheless accomplish much for the common good, by making Catholics more conscious of how great a public evil is civil divorce, and how sacred and indissoluble is Christian Marriage.

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"Everything intelligent has already been thought; one must only try to think it again."

GOETHE.

I

THE doctrine that a government has several "branches" that are not only capable of being "separated" from one another but, indeed, must be so separated in order to preserve the basic liberties of the citizen has been reiterated until it has achieved the importance of a religion. Its priests number among their ranks persons of every walk of public life[1] as well as a vast number of legal writers from Blackstone[2] to date[3] and vociferous American Bar Association meetings.[4] The Supreme Court ranks foremost among those who have maintained that "it was to prevent an appeal to the sword and a dissolution of the compact that this Court, by the organic law, was made equal in the origin and equal in title to the legislative and executive branches of the government: its powers defined, and limited, and made strictly judicial and

[1] Cf. Ambassador John G. Winant in the *New York Times,* September 15, 1947, p. 2, col. 2: Unlike the British, we "delegate authority under written contracts which we refer to as Constitutions both in the several States and for the United States. The separation of powers of the executive, the legislative, and the judiciary was common to both the States and the Federal Government and designed to safeguard the liberties of the people." Nicholas Murray Butler, "Die republikanische Staatsform," pp. 5-6 (address to the Austrian Parliament, June 22, 1931), describes the separation of powers as "the foremost particularity" of the American Constitution, "invented by Aristotle, taught by Montesquieu, and regarded as the most important thing by founders of the American Constitution." See also William B. Munro, *The Government of the United States* (5. ed., 1946), p. 57, and virtually hundreds of others.

[2] 1 *Comm.** 266-267.

[3] E. g., 1 Trowbridge vom Baur, Federal Administrative Law, Cumulative Supp. 2, 15 (1947); Roscoe Pound, *The Separation of Powers* (1945).

[4] 61 Annual Report 720, 722, 731 (1936).

placed therefore beyond the reach of the powers delegated to the Legislative and Executive Departments." [5] In other words, it has appeared to many that the separation doctrine stands at the very fundament of our political life; that it is, indeed, "perhaps our chief contribution to the science of government. No theatre of the American system has excited greater admiration." [6]

Without attempting to determine the justification of this enthusiasm, we may briefly inspect its historic foundation.[7] Montesquieu is generally regarded as the originator of governmental trialism, but, as behooves a true revelation, he is alleged to have had his forerunners.[8] The first among the prophets is said to be the inevitable Aristotle.[9] Nothing could be more inaccurate.

Aristotle,[10] it is true, mentions without further analysis that "every good constitution" has three elements, the first of which is an organ that not only deliberates common matters,[11]

[5] Taney, C. J., in *Gordon* v. *United States*, 2 Wall. 561 (1864), fully reported in 117 U. S. 697, 701-702; Sutherland, J., in *O'Donoghue* v. *U. S.*, 289 U. S. 516, 530-532 (1939). See also case cited *infra*, note 6, and many others.

[6] *State* v. *Fulton*, 99 Ohio 168, 124 N. E. 172, 177 (1919); one of the "chief merits" of the Constitution, *Kilbourn* v. *Thompson*, 103 U. S. 168, 190 (1880), a decision which Carl J. Friedrich, 13 *Encyc. Soc. Sci.* 663 (1934), believes to be a "comprehensive statement of the doctrine of separation of powers and its powers."

[7] I am aware, as are my readers, that veritable libraries have been written on the subject of the separation of powers in general and that of the judicial and administrative branch in particular. I must necessarily confine myself to occasional references that are necessary because of the paramount importance of the passage cited.

[8] Cf. Fairlie, "The Separation of Powers," 21 *Mich. L. Rev.* 393 (1923); Sharp, "The Classical American Doctrine of 'The Separation of Powers,'" 2 *U. of Chic. L. Rev.* 385 (1935); William A. Dunning, *A History of Political Theories, Ancient and Medieval* (1902).

[9] See, e.g., Butler, *op. cit. supra*, note 1; Fairlie, *op. cit supra*, note 8.

[10] *Politics*, 1297b-1300b. See Huntington Cairns, *Legal Philosophy from Plato to Hegel* (1949), pp. 77-126.

[11] Τὸ βουλευόμενον περὶ τῶν κοινῶν.

but is also the supreme authority [12] of the constitution, particularly in regard to war and peace, the formation or dissolution of alliances, sentences of death, exile, or property confiscation, as well as the accounts of the magistrates. The second organ is the judiciary,[13] whose criminal and civil jurisdiction is listed, whereas the function of the third one, the magistrates [14] is not indicated. While with a somewhat keen imagination one might see a resemblance between Aristotle's supreme organ of state and our Congress, there is nothing to suggest a "separation" between the three governmental organs. None of the Greek constitutions knew of any separation of powers.

Nor did Rome. Polybius,[15] who, like others before and after him, distinguishes between three kinds [16] of constitutions (monarchy, aristocracy, and democracy), finds that the Roman constitution has elements of every one of them: The popular assemblies confer honors and inflict punishment; [17] the consuls control the military; and—seemingly most important to Polybius—the senate controls matters of revenue and expenditure as well as supplies for the army, decides whether a consul remains a general after his term expired, and decrees or denies a formal triumph. He finds this constitution most perfect, because of the counteraction and co-operation [18] of one branch with the other. There is, indeed, a system of checks and balances between various supreme organs of state, but certainly not just between the executive and judiciary.

[12] Κύριον.

[13] Τὸ δικάζον.

[14] Τὸ περὶ τὰς ἀρχάς.

[15] *Histories*, Book VI, particularly 3, 11-18.

[16] To what extent ancient beliefs in the sacredness of the figure 3 have influenced political thinkers of the past need not be investigated here. Cf. Kroeber, *Anthropology* (1923), p. 252.

[17] Polybius *does not even mention* their law-making power! Book VI, 14.

[18] Ἀντιπράττειν βουληθέντα καὶ συνεργεῖν ἀλλήλοις, *ibid.*, VI, 15.

Moreover, Polybius' description is not borne out by the history of Rome.[19]

Cicero follows Polybius but vaguely and does not deserve our attention on this point. Medieval thinkers such as Marsilius of Padua or Thomas Aquinas, have frequently been mentioned as distinguishing between the legislative and the executive power.[20] Yet neither they nor Richard Hooker (1553-1600)[21] furnish any tangible support of a true separation doctrine. Hooker, it is true, and worth noting, ushered in the modern concept of natural law[22] and expounded the social-contract theory,[23] though he does not use the term. Yet it cannot be maintained that he wanted the sovereign, who makes all the laws, including those of the church,[24] and who exercises the judicial power,[25] to be limited in his power except, of course, through the "natural law" itself.[26]

With the increasing complexity of economic life, and hence of law making and applying, as well as with the arrival of political theories going far beyond the detached views of the antique philosophers, the idea of a functional division within a given government was gradually gaining ground. Writers—chiefly utopians—proposed that the laws should be "executed" by individuals other than those making them.[27] None

[19] Mommsen, *Abriss des Römischen Staatsrechts* (2. ed., 1907), pp. 157-212 and *passim*. See also Cowell's excellent book, *Cicero and the Roman Republic* (1948).

[20] Fairlie, *op. cit. supra* (note 8), at p. 394.

[21] Whom Raymond G. Gettell (*History of Political Thought* [1924], p. 197) and Burgess (*Introduction to Philosophy* [1938], p. 543) and others claim to be the archfather of the modern separation doctrine.

[22] 1 Richard Hooker, *The Laws of Ecclesiastical Policy, passim*. Ebenezar Th. Davies, *The Political Ideas of Richard Hooker* (1946), pp. 44-61.

[23] 1 Hooker X, 1, 4; XV, 2; *ibid.*, II, 5. His *pactum subjectionis* was used, like that of Hobbes, to support absolutism and not in the revolutionary sense of Locke or Rousseau. Davies, *op. cit. supra* (note 22), at p. 77.

[24] 8 Hooker VI, 13.

[25] 8 *id.* III, 8.

[26] 8 *id.* II, 10.

[27] E. g., Milton, *Eikonoklastes* (1649), ch. 6.

of them, however, suggested a division between the judiciary and administrative functions, nor can such a division be found in the actual usage of the states, at least not before the eighteenth century.[28]

Finally, the time came when the king no longer ruled alone. Ministries and "courts"—*parlements* in France—helped govern the land. And, of course, in England as well as in other monarchies there were, varying with the time and place, the Lords and Commons, the *états généraux,* the *Staende,* which partook in the making of statutes.

Montesquieu's spiritual predecessor is John Locke, who wrote at a time when great restrictions were imposed upon the monarchy in England. In the second of his Treatises on Government[29] he discusses the three organs necessary in a good government: the legislative, executive, and federative. The federative[30] power, however, includes only "War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth," in short, foreign affairs, which exist "in respect to things dependent on the law of nations." The executive power, on the other hand, is concerned with "things that depend on the civil law." Its bearer "punishes crimes or determines the disputes that arise between individuals. The latter we shall call the judiciary power. . . ." Thus Locke, though by no means overlooking the judiciary,[31] regards it as a part of the law-executing function. Moreover, he declares that the executive must be under the same control as the "federative" power, i.e., headed by the monarch. The latter, on the other hand, must not control the legislative power, which must be su-

[28] Any separation of powers was "alien to English political life until the time of Anne." Landis, "Statutes and the Sources of Law" in *Harvard Legal Essays* (1934), p. 215.

[29] Ch. 6 (1690).

[30] From *foedus,* the alliance.

[31] As William Bondy (*Separation of Governmental Powers* [1893], p. 11) believes.

preme.[32] Locke, describing and rationalizing English conditions, was the first to announce in clear terms that king and parliament ought to be "separate" from each other in the sense that the former must not interfere with the latter (but not vice versa). Locke, however, sees no reason for separating the judiciary from other law executing agencies. Justice is still the king's justice, mitigated by natural law.

In 1701 English judges became irremovable *quamdiu bene se gesserint* [33] and after 1738 [34] they could not be removed at all except upon the address of both houses of Parliament, because his majesty was "pleased to declare that he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, and most conducive to the honor of the crown." [35] With these laws the judiciary in England attained a special importance within the governmental hierarchy. The king was now not only "checked" by, or subjected to, the legislative, but also to the law courts.[36]

It was this independence of the judiciary that struck Montesquieu, the founder of modern sociology and a not very sagacious admirer of English institutions,[37] when he wrote his *De l'esprit des lois* in 1748. He rejects absolutism, like Locke, on whom he relies. The legislative power is to be with the people, who, however, under the social-contract theory of the time, have delegated it to a two-chamber legislature consisting

[32] For an excellent, modern description of Locke's ideas see Bertrand Russell, *A History of Western Philosophy* (1945), pp. 617-640.

[33] 13 W. III c. 2.

[34] 1 Geo. III c. 23.

[35] 1 Bl. *Comm.** 268.

[36] This "has merely substituted the judge's prejudice for the king's." Russell, *op. cit. supra* (note 32), at p. 639.

[37] G. Bourgin, *Die Franzoesische Revolution* (1922), p. 10.

of the hereditary nobility and representatives to be elected by property owners.[38]

Whatever Montesquieu has to say of the separation of powers is unclear and confusing.[39] In paragraph one[40] he divides the executive power of the state into such matters that depend on the law of nations and those that depend on domestic law. Paragraph two, however, defines the first-mentioned group as the one by which its bearer "makes peace or war, sends or receives embassies, establishes the public security, provides against invasion," whereas under the other *puissance executive* "he punishes criminals, or determines disputes arising between individuals. *The latter we call judiciary power, and the other simply the executive power of the state.*"[41] According to this distinction it would appear that the executive (in the narrower sense) consists only of the power to handle foreign and military affairs! If Montesquieu really thought so, then it is easy to understand why he insists on a separation of those powers, saying[42] that "there is no liberty where the judiciary is not separated from the legislative and executive. Were it merged with the executive power, the judge might behave with violence and oppression." Montesquieu, however, further explains[43] that it would be bad if the same man or body would exercise the three powers, namely,

[38] The German natural-law doctrine (Pufendorff, Thomasius, Christian Wolff), on the other hand, defended the absolutist dogma: the monarch is not bound by the laws, though he is under a moral obligation to observe them, and his subjects have no right of insurrection. Consequently, the power of the state is indivisible. Cf. Kurt Kaser, *Geschichte Europas im Zeitalter des Absolutismus und der Vollendung des modernen Staatensystems* (1923), pp. 236-237. Baron Montesquieu, writing under the Damocles sword of French censorship, and also by conviction, is somewhat more conservative than Locke, the contemporary of the first modern, successful revolution.

[39] A. Uhler, *Review of Administrative Acts* (1942), pp. 5-7.

[40] *Esprit*, XI/6.

[41] Italics supplied here and *infra*.

[42] *Ibid.*, XI/6, par. 5.

[43] *Loc. cit.* and par. 6.

" that of making laws, *executing the public resolutions,* and that of trying cases." The phrase " executing the public resolutions " is not only broader than the executive power delineated above; it actually excludes the latter, because foreign affairs, according to Montesquieu as we have seen, are conducted under the law of nations and not under the public resolutions of the law-maker. Thus here, but not above, we have at last a contraposition of judiciary and executive in our sense of the word. Or so we would—if Montesquieu himself would not destroy his own proposition by further explaining [44] that the judiciary really " amounts to nothing," [45] and that consequently there remain but two powers, the legislative—composed of two houses of legislature, one checking the other—and the executive, consisting of the king.

Despite his inconsistencies, Montesquieu has been religiously regarded [46] as the ultimate author of the theory that the functions of government are capable of being divided into three powers categorically different from one another; and that the separation of these powers is essential for the preservation of human liberties.

The tripartite separation of powers idea, or ideal, was accepted soon enough. Thus Blackstone, although not overlooking that government consists in making and enforcing the laws wherefore the governmental " power is divided into two branches " [47] (and not three), maintains that in order to preserve " public liberty " the administration of justice must be " in some degree " separated from the legislative and executive powers.[48] There is no doubt in Blackstone's opinion why this must be so. Although he does not define the judiciary,

[44] *Ibid.,* par. 34.

[45] *Des trois puissances dont nous avons parlé celle de juger est en quelque façon nulle.*

[46] " The oracle who is always consulted and cited on this subject is the celebrated Montesquieu."—*The Federalist,* No. 47 (Madison).

[47] 1 *Comm.** 146.

[48] *Id.** 266-269.

or delineate its powers against the executive, it is clear that as a matter of legal history the courts were chiefly called upon to decide disputes concerning property or to render judgment in prosecutions for crimes. In other words, they handled litigations in which there were invoked "those rights which God and nature have established, and are therefore called natural rights . . . such as life and liberty. . . . No human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture." [49]

The natural-law doctrine of the Enlightenment [50] served the revolutionary purpose of reducing the monarch to a mere removable servant of the sovereign people. The monarch must not make laws though he may execute them through his ministers and courts, and parliament must not "make"—or change, which is the same—that part of the law which is "natural" or "divine." The strict separation doctrine added to this that the king may not even execute the natural law. This addition, however, is no longer anything revolutionary. It represents a desire to keep the social order of things as they are.

To the Fathers, the idea of separation not only of the legislative from the law-applying power, but also, within the latter, of the judicial from the remaining executive was not a problem but, indeed, a premise.[51] Only the extent of strictness with which the new gospel was to be applied was a subject of dispute.[52] The separation of the judiciary from the

[49] 1 Bl. *Comm.** 54, and "The Law of Nature is binding all over the globe in all countries at all times: no human laws are of any validity if contrary to this." *Id.*, Introd. 2. But Blackstone really "knew better," Buckland, *Some Reflections on Jurisprudence* (1945), p. 34.

[50] Or, more correctly speaking, its Anglo-French branch. The Germans (Pufendorff, Thomasius, Christian Wolff) defended the absolutist dogma. See note 38 *supra*.

[51] Sharp, "The Classical American Doctrine of 'The Separation of Powers,'" 2 *U. of Chi. L. Rev.* 385, 393 (1935); Documents Illustrative of the Formation of the Union of the American States 87, 120, 201, 234, and *passim* (H. R. Doc. No. 398, 69th Cong., 1st Sess., 1927).

[52] See *The Federalist*, Nos. 47-51 (Madison).

executive in particular was hardly discussed at the constitutional convention, as far as I can see.[53] The conservative Federalists succeeded in having adopted the checks and balances of our Constitution, notably the establishment of a Senate, only one third of whose members were currently appointed, the absence of plebiscites, the practical unalterability of the Constitution, and above all a strong chief executive remote from the control of the people, Congress, or courts. The times were such as to make this conservatism understandable. The wind of the French Revolution blew across the Atlantic. Some of the Fathers, notably John Adams, were afraid of "legislative despotism"[54] and did not mince their words to say so.[55] They feared that an all-powerful legislature[56]—national or in the States—could enact laws in favor of debtors or that, *horribile dictu,* the sacredness of property could be impaired.[57] The Constitution was expected, and

[53] Cf. Documents, *supra,* note 51; *The Federalist, passim.*

[54] James Wilson of Pennsylvania in Documents, *supra,* note 51, at pp. 212-213.

[55] Sharp, "The Classical American Doctrine of 'The Separation of Powers,'" 2 *U. of Chi. L. Rev.* 385, 398-406 (1935).

[56] Οἱ πλεῖστοι κακοί: "The majority are wicked," says John Adams in a marginal note, 4 John Adams, *Works* (C. F. Adams ed. 1851-1865), 407.

[57] "Who would trust his life, liberty, and property to a madman or assembly of them? . . . Suppose a nation, rich and poor, high and low, ten millions in number all assembled together; not more than one or two millions will have lands, houses, or any personal property;" unquestionably, "if all were decided by vote of the majority, the eight or nine millions who have no property would not think of usurping over the rights of the one or two millions who have property. *Property is surely a right of mankind as really as liberty.* Perhaps, at first, prejudice, habit, shame or fear, principle or religion would restrain the poor from attacking the rich, and the idle from usurping on the industrious: but the time would come, and pretexts be invented by degrees, to countenance the majority in dividing all the property among them, or at least, in sharing it equally with its present possessors. Debts would be abolished; *taxes laid heavy on the rich, and not at all on the others;* and at last a downright equal division of every thing be demanded, and voted." 6 John Adams, *Works* 7-9. (Italics supplied.)

proved, to be a bulwark against such Jacobine ideas.[58] As we know, it was adopted against much popular opposition.[59]

In a system such as that of our government the separation of the courts from the President [60] has had a significance entirely different from what Montesquieu, Blackstone, and other supporters of constitutional monarchism advocated. The purpose was not to weaken the king's powers by both a powerful legislature and the " natural law," but to curb the people [61] by the exclusion of plebiscites [62] at least in the Federal realm, to curb the legislature [63] by an independent Chief Executive, and to curb both of them through the courts.[64]

If this was the intention in the last analysis, however, there ought to be no " separation " of the executive from the judiciary. For where there is " separation," there must be independence of one branch from the other and consequently no

[58] As, e.g., expounded by Patrick Henry, who desired to give the underprivileged an adequate share in the government. Defending the exercise of judicial power by the (Virginia) legislature in a treason case, he told Gov. Randolph that " the middle and lower ranks of people have not those illuminated ideas which the well-born are so happily possessed of." 3 Jonathan Elliott, *The Debates in the Several State Conventions* (2. ed., 1896) 66-67, 137, 140.

[59] Charles Adams, Preface to 4 John Adams, *Works* 275-276.

[60] Criticized by Thomas Paine, *The Rights of Man* (1792), II/4: " But if we permit our judgment to act unencumbered by the habit of multiplied terms we can perceive no more than two divisions of power . . . that of legislating or enacting laws, and that of executing or administering them. . . ." Another opponent was Benjamin Franklin. Wright, " The Origins of the Separation of Powers in America," 13 *Economica* 169, 170 (1933). Neither Paine nor Franklin took part in the Constitutional Convention. See also notes 71-73 *infra*.

[61] Whom the Fathers thought of as consisting of three classes: professionals, commercial men, and " the landed interest." Pinkey in Documents, *supra*, note 51, at pp. 271-272; *The Federalist*, No. 35 (Hamilton).

[62] Cf. *The Federalist*, Nos. 10 (Madison), 52, 49, 63 (Hamilton or Madison).

[63] Documents, *supra*, note 51, *passim*.

[64] Albert F. Pollard, *The Evolution of Parliament* (2. ed., 1926), p. 254: " The keynote of the American constitution was . . . distrust of the government and also distrust of the people."

judicial review of the acts of the legislative or executive. In such a system it is up to the legislature to see to it that only constitutional laws are enacted, and to the chief executive, or some supreme executive authority,[66] that no illegal (or unconstitutional) act is committed in his department. This is the avenue the countries of Europe[67] followed.[68] Not that there exists anywhere a true, categorical separation of powers within one system of law. That is truly impossible; but we do find in Europe judiciaries not authorized to "interfere" with, i. e., to pass on the validity of, acts set by the executive.[69] However, we must confine ourselves to American law.[70]

Here a separation of powers was set up as a counterweight to popular democracy despite much noteworthy criticism such as that of Turgot, who in a letter of March 22, 1778[71] criticized our various State constitutions. He termed our checks and balances "an uncritical imitation of the usages of Eng-

[66] Like the administrative courts of many European countries. *Infra,* notes 68, 70.

[67] All of which were monarchies throughout the 19th century except the Swiss cantons and, periodically, France.

[68] Uhler, *Review of Administrative Acts* (1942); Kelsen, *Justiz und Verwaltung* (1929), pp. 8-10 and *passim.*

[69] Cf. Kelsen, "Der Begriff des Kompetenzkonfliktes nach geltendem oesterreichischem Recht," 57 *Juristische Blaetter* 105 (1928); *id.*, "Zum Begriff des Kompetenzkonfliktes," 7 *Zeitschrift für oeffentliches Recht* 583 (1928). The classical country of an independent administration has been France since the Revolution. Cf. e.g., Russell, *op. cit. supra* (note 32), at 639 ff. Yet it also presents the best example of a legal system that nevertheless imposed a judicial control on the *régime administratif.* Uhler, *Review of Administrative Acts* 11-18 and *passim.* Kelsen, "La Guarantie jurisdictionnelle de la Constitution," 45 *Revue du droit public et de la science politique* 197 (1928).

[70] In Europe the separation doctrine has been attacked by fascist sociologists as a sign of decay, of lacking unity, and of a desire to "mechanize" the "life" of the state. Othmar Spann (one of the founding fathers of fascism), *Die Haupttheorien der Volkswirtschaftslehre* (19. ed., 1929), p. 22; George W. Paton, *A Textbook of Jurisprudence* (1946), p. 130; John W. Jones, *Historical Introduction to the Theory of Law* (1940), pp. 280, 283.

[71] Lettre de M. Turgot, Ministre d' état en France, à M. le docteur Price (1784), also in 5 *Oeuvre de Turgot* (Gustave Schelle ed. 1923), 532.

land. Instead of bringing all the authorities into one, that of the nation, they are busy balancing these different authorities: As if the same equilibrium of powers that has been thought necessary to balance the enormous preponderance of the royalty could be of any use in republics, founded upon the equality of all the citizens." [72] It was against this letter that John Adams published in 1787 and 1788 his above-quoted three-volume "Defence of the Constitution of Government of the United States of America, Against the Attack of M. Turgot in His Letter to Dr. Price, Dated the 22nd Day of March, 1778." [73]

The separation of powers was established chiefly in name and legend.[74] The development of the Constitution went in another direction—necessarily so, in view of its history as well as the inherent impossibility of drawing a logical line between the powers.

II

If out of an amorphous group of physical or social phenomena two or more categories are to be set up, some definition of each group will be necessary. Torts can be "separated" from crimes only if we are able to state the characteristics of either form of legal wrong. If the respective definitions are weak, the differentiation must necessarily be weak, too.[75] Consequently, at the bottom of any attempt to

[72] 5 *Oeuvre de Turgot* 532, 534-535.

[73] 4-6 John Adams, *Works* (C. F. Adams ed. 1851-1865).

[74] Albert F. Pollard (*The Evolution of Parliament* [2. ed., 1926], pp. 252, 257) calls the separation of powers "a will of the wisp" and nothing but "a specialization of functions."

[75] For instance, the classification of law as either "public" or "private" (Ulpian in Dig. [1. 1], 1, 2) has never been very useful for the reason that the definition of public and private law as concerning respectively public or private interests leads nowhere in view of the different views entertained on this question. Property, for instance, is constitutionally protected in the interest of the existing society, yet property law is generally regarded as private law.—The division of law into substantive and adjective, on the other hand, is only partly vague. Consequently it has produced partly useful results.

separate the executive from the judiciary must stand the question, What is the former, what the latter?[76] It is at this point that we are already stalled.

The Constitution has no definition of the term "administrative." The discussions and writings of the Fathers mention the executive power frequently but do not explain its essential features except for those authorities that have been reserved for the Chief Executive,[77] hardly one of which is typically "administrative" in the now traditional sense. Nor is there, of course, any reference to "independent" agencies as we have them now.

It was left to the courts, aided by whatever legal science might have to say, to circumscribe the executive branch.

No court has ever been able to define the executive branch of government. Now, of course, it would not be necessary and it is, indeed, outside the traditional task of courts to give a real, so to speak, Aristotelian definition. The courts have rarely if ever defined the term "tort" or "contract"; yet they have, from precedent to precedent, piled up so many characteristics that legal science could easily restate the *genera proxima* and the *differentiae specificae* of those categories. Not so in our field. Only a handful of cases have ruled that certain matters are of the executive province, not because of a general, supposedly innate, concept (such as might be the necessity of "policy making"), but because of the peculiar nature of the subject matter itself. Thus the question whether certain regulations issued by a foreign government[78] were to

[76] The analogous question as to the separation of the legislative from the other powers is not within the scope of this article. If it were, it would be easy to show that there is but a gradual difference between these powers in that the legislature as well as the law-applying agencies are invariably applying the law (including the Constitution) by making law, e.g., the judge or administrative officer by deciding the case under consideration and directing the parties to act in a certain manner. See also note 93, *infra*.

[77] Such as the veto against legislative bills, the right to appoint officials and judges, to make treaties, or the status as Commander-in-Chief of the Armed Forces.

[78] That of General Carranza of Mexico, the opponent of General Huerta.

be recognized as foreign law in this country, depending in turn on the question of the validity of our recognition of that government, was held to be "political" and committed to the legislative and executive, or "political" departments of the government.[79] Actually, the question "who is the sovereign . . . of a territory" [80] is by all means a legal one capable of determination under international law.[81] But the Supreme Court, perhaps mindful of Locke's federative power, holds it to be incapable of judicial, but capable of executive, determination. In *Mississippi* v. *Johnson* [82] it was sought to enjoin the defendant President of the United States from carrying out the Reconstruction Acts, passed over his veto on March 2 and 23, 1867, and claimed to be unconstitutional by the plaintiff. The Court could have held the Acts constitutional and dismissed the bill. Or it could have based its dismissal on lack of equity jurisdiction. Actually the Court decided that it is solely in the Chief Executive's province to execute the laws faithfully. This, then, too, is an administrative matter. Likewise, under the Constitution, the duties of the State governments toward one another are held to be "political" and incapable of judicial determination, at least in some instances.[83] And obviously cognate to this idea is the question whether a State has a republican form of government, as "guaranteed" in Art. IV, § 4 of the Constitution, is "political in character, and therefore not cognizable by the judicial power." [84] Here

[79] *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918); *Jones* v. *United States*, 137 U. S. 202 (1890).

[80] *Jones* v. *United States*, 137 U. S. 202, at 212; but see *Vermilya-Brown Co.* v. *Connell*, 69 S. Ct. 140 (1948).

[81] Kelsen, *General Theory of Law and State* (1945), pp. 221 ff.; *id.*, "Recognition of International Law," 35 *Am. J. Int'l. L.* 605 (1941).

[82] 4 Wall. 475, 500-501 (1867).

[83] *Kentucky* v. *Dennison*, 24 How. 66, 103, 107 (1860), where a suit against the Governor of Ohio for delivery of a fugitive from justice was dismissed. See also Robert L. Hale, "Unconstitutional Acts as Federal Crimes," 60 *Harv. L. Rev.* 65 ff., 70 ff. (1946).

[84] *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118, 133 (1912). In this case, however, the court held the question to be up to the legislative and not the executive.

again the court could have easily decided the case on the merits by saying that the enactment of a statute of referendum—as Oregon had enacted it—was nothing unrepublican, and that the statute was therefore valid.

Nor was it cogent to label as "political" and "therefore" not justiciable the apportionment of Congressional districts.[85] In other words, cases concerning the matters mentioned above[86] as well as relations with Indian tribes[87] and some other matters have been held to be political questions[88] and incapable of being considered by the courts. The above holdings can hardly serve as a useful basis for reaching any conclusion *per inductionem* as to what administrative agencies must do or forbear from doing. They involve clearly the powers of the Chief Executive,[89] rather than those of the lower level of the administrative branch of government. In other words, they concern situations where the courts, holding that certain matters should be administered by the President, have refused to "interfere." But in regard to the lower brackets of the administration, it has been until recently mostly the courts that have made the law, and not the agencies.

As far as we can see, the courts have mainly undertaken to define, or rather list, the characteristics of the executive in a negative manner; i. e., by saying that such and such matters do not belong to this branch, but rather to the judiciary. We may say at once that this negative approach has not produced, with one exception,[90] a satisfactory, tenable result.

[85] *Colegrove* v. *Green,* 328 U. S. 549 (1946). But see Mr. Justice Black, diss. at 566; Note, 41 *Ill. L. Rev.* 578 (1946).

[86] Foreign affairs, the President's duty to execute the laws, State duties under the Constitution, republican form of government, or congressional districts apportionments.

[87] *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831).

[88] Field, "The Doctrine of Political Questions in the Federal Courts," 8 *Minn. L. Rev.* 485 (1924).

[89] Cf. note 86, *supra.*

[90] See note 97, *infra.* But see note 98, *infra.*

Before further examining some court opinions, it is worth noting that legal science has not been able to give us a positive concept of the administrative power, either. Thus the adoption by Thomas R. Powell[91] of Chief Justice Marshall's[92] resonant distinction according to which "the difference between departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law," is as futile as it was a hundred years ago. It will be futile until somebody does the impossible and informs us of the difference between "executing" and "construing" law.[93] Another frequently heard characterization of administrative law is that it is supposed to be invariably created by statutory law.[94] Even if this is true,[95] it leads nowhere in view of the fact that the courts, too, apply, and in America are created by, much statutory law.[96]

[91] "Separations of Powers," 27 *Pol. Sci. Q.* 215 (1912); 28 *ibid.* 34 (1913).

[92] *Wayman* v. *Southard,* 10 Wheat. 4 (1825).

[93] The statement that only the legislature makes the law is not as manifestly untenable, yet it is unsound. For, above all, the mass of our common law, was "made" by judges; and where a decision does not make "new" law it yet "applies" the existing law by "making" a rule under it. In other words, the judge applies the more general norm by making a less general one; but it is, nevertheless, a norm. Kelsen, *General Theory of Law and State* (1945), pp. 123-161; *id., Reine Rechtslehre* (1934), pp. 62-80; *id., Allgemeine Staatslehre* (1925), pp. 231-235; Adolf Merkl, *Allgemeines Verwaltungsrecht* (1927), pp. 85, 171-173.

[94] John Willis, "Three Approaches to Administrative Law," 1 *U. of Toronto L. J.* 53 (1935). The author admits, however, that there is no essential distinction between the two types of governmental power.

[95] Which it is not. Cf. the duty of cities, before Henry VIII, to keep highways in repair or to sustain the poor, 1 Bl. *Comm.** 357-359; or the more important fact that much of the law to be applied by any administrative agency is ancient common law, as, e.g., the proviso, implied everywhere, that "due process" must be applied.

[96] Two experts in the field of administrative-legal mechanics have stated that "the function performed by administrative agencies . . . may be classified . . . as: sovereign or political, contractual, revenue, proprietory, promotional, benefactory, protective, conciliatory, mediatory or arbitral, judicial, and regulatory." Blachly and Oatman, "Sabotage of the Administrative Process," 6 *Public Adm. Rev.* 213 (1946). See also the same authors, *Administrative*

Returning to the courts and their negative approach in circumscribing the executive by listing, from instance to instance, the legal matters that belong to the judiciary—we can easily see that only in regard to criminal law have the federal courts succeeded in establishing a definite category of the law administered by the courts and hence not by the executive.[97] Here we do have a group of norms sufficiently definite to distinguish it from other chapters of the law.[98] However, the king has for a long time refrained from hearing criminal cases[99] and thus a statement that administrative law is a body of norms not containing criminal law would not particularly enrich our knowledge.

Nor do we get much farther when we learn that the courts claim certain powers as "inherent," which consequently may not be exercised by administrative agencies. These include such diversified matters as the power to have the court building repaired[100] or to regulate bar examinations,[101] although

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Legislation and Adjudication (1934). Words, words, words! All these things may well be ascribed to the courts, too. The American Bar Association in 61 Annual Report 720 (1936), and elsewhere, has often started, full of sound and fury, to attack "encroachments" of the executive upon the judiciary only to be invariably forced to admit (*ibid.*, pp. 726 ff., 751 ff.) that it is "difficult" to draw a line between the functions.

[97] *Wong Wing* v. *United States,* 163 U. S. 228 (1896).

[98] Yet the imposition of forfeitures and penalties by administrative authorities has been sanctioned by the Supreme Court. *Passavant* v. *United States,* 148 U. S. 157 (1893), involving the Collector of Customs' authority to impose fines on steamship companies. See Milton Kallis, "Constitutional Limitations on Administrative Agencies," 3 *J. of the Kan. Bar Ass'n.* 251, 258 (1935). And *in praxi* it is often the administrative organ which actually prescribes and determines fines, e.g., in revenue matters, or minor traffic violations where the accused "elects" to "forfeit" the collateral he put up.

[99] Abolition of the Court of Star Chamber, 16 Car. I c. 10 (1634).

[100] *The Board of Commissioners of White County* v. *Gwin,* 136 Ind. 562, 36 N. E. 237 (1894), so holding because it involves "the very existence" of the court. Would the court, by the same taken, also claim the power to make budgetary appropriations for the judiciary?

[101] *Opinion of the Justices,* 279 Mass. 607, 108 N. E. 725 (1932), 81 ALR 1059.

the latter inherency becomes somewhat dubious if it is realized that for another jurisdiction the Supreme Court accepted the "authoritative commentary" made by the Illinois Supreme Court Justices as "establishing for that state the non-judicial character of an admission to the bar." [102] In other words, this, too, is a matter of positive law.

The courts have at times fortified their powers behind U. S. Constitution, Art. III, § 2:[103] To enable the courts to act there must be a "case" or "controversy." Does this postulate mean that the courts have arrived at any tangible, lucid definition of "case" or "controversy"? If so, can it be said that a case or controversy may be decided by the judiciary only? And, consequently, are the courts engaged solely in deciding cases and controversies? [104] The answer to all three questions is in the negative.

Chief Justice Marshall, the great classicist,[105] informs us [106] that a suit is "the prosecution, or pursuit, of some claim, demand, or request . . . [quoting Blackstone]: 'the being put in possession of that right whereof the party injured is deprived. . . . Or as Bracton and Fleta expressed it, in the words of Justinian: *Jus prosequendi in judicio quod alicui debetur*': to obtain something to which he has a right." Yet, Marshall adds, this concept does not extend the judicial power to every violation of the Constitution that might possibly take place but only "to a case in law or equity, in which a

[102] *In re Summers,* 325 U. S. 561, 565, reh. den. 326 U. S. 807 (1945).

[103] "The broad (we may almost say vague) proposition of the Constitution," Buckland, *Some Reflections on Jurisprudence* (1945), p. 38.

[104] "If it is one corollary of the separation of powers that essential judicial functions may not be withdrawn from the courts, it is another that non-judicial functions may not be imposed upon them." Ralph F. Fuchs, "Concepts and Policies in Anglo-American Administrative Law Theory," 46 *Yale L. J.* 538, 553 (1938).

[105] What he says "has some lofty sound; it is well and finely said; but it can never be more than partly true." Cardozo, *The Nature of the Judicial Process* (1921), p. 169.

[106] *Cohens* v. *Virginia,* 6 Wheat. 264, 407 (1821).

right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given" to the federal courts.[107] And in *Osborn* v. *United States Bank*[108] Marshall reiterates that the judiciary article of the Constitution "enables the judicial department to receive . . . jurisdiction . . . when any question respecting them *shall assume such a form* that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights *in the form prescribed by law.* It *then becomes a case,* and the Constitution declares, that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."[109] In other words, Marshall himself could not go beyond saying, in so many words, that a case or controversy is any litigation in the traditional judicial form![110] And thus it has remained, from the oldest cases down to *Smith* v. *Adams,*[111] and thence via many more reiterations[112] to our time.[113] The statements

[107] *Id.* at 405; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 455 (1899).

[108] 9 Wheat. 738, 819 (1824).

[109] Italics supplied.

[110] Which is not necessarily a two-party dispute. Cf. the cases where the courts' inquisitory power against members of the bar was upheld: *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 162 N. E. 487 (1928); *Ex parte Wall,* 107 U. S. 265 (1882); *Randall* v. *Bringham,* 7 Wall 523, 540 (1868). Or bankruptcy, probate, guardianship and related matters.

[111] 130 U. S. 167 (1899).

[112] As in *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 469, 485 (1894); *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 455 ff. (1899); *Muskrat* v. *United States,* 219 U. S. 346, 356 (1911); *Postum Cereal Co.* v. *California Fig Co.,* 272 U. S. 693, 698-701 (1927); *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 279 U. S. 716, 722-725 (1929); *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 469-470 (1930), noted in 42 *Harv. L. Rev.* 948 (1929), 49 *id.* 333 (1936), 33 *Col. L. Rev.* 921 (1933); *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227 (1936); *Texas* v. *Florida,* 306 U. S. 398 (1939); *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130-131 (1939); and hosts of others.

[113] As *Oklahoma* v. *United States Civil Service Commission,* 67 S. Ct. 544, 550 (1947); *United Public Workers* v. *Mitchell,* 67 S. Ct. 556, 564-565 (1947).

of the courts have added nothing new to what had already been expounded by Chief Justice Marshall; [114] and so far as new situations have arisen and have been declared to be, or not to be, "cases or controversies," [115] we cannot say that they have accumulated a sufficient mass of criteria to enable us to determine *a priori* the judicial or administrative nature of a legal question. Thus we are told that the expulsion of a member from an organization is "judicial in its nature," [116] because it involves "rights." And so is the authority of federal courts to summon witnesses and subpoena documents, though it be in aid of an administrative agency.[117] As a matter of fact, any type of administrative decision has been held capable of judicial review ever since *Marbury* v. *Madison*,[118] to an extent that necessarily defines rationalization, since it is based on such vague concepts as the requirements that "rights" of the parties must be involved.[119] We shall not go into that war

[114] Notes 105-109, *supra*.

[115] With reference to the further notion that courts do not engage in "policy" making, see *infra*, note 147.

[116] *Innes* v. *Wylie*, 1 Car. & K. 257, 362, 174 Rep. 800, 803 (Q.B. 1844); 4 *Am. Jur.*, Associations & Clubs §§ 17-28.

[117] *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894); but see *diss. op.* at 155 U. S. 1.

[118] 1 Cranch 137 (1803); *Kendall* v. *United States*, 12 Pet. 524 (1838).

[119] Uhler, *op. cit. supra* (note 40), at 67-69. Cushman, "Departments of Government," 20 *Am. Pol. Sci. Rev.* 585, 586 (1926). Cf. Mr. Justice Frankfurter in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139-140 (1939) stating that "the range of issues is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised." That, of course, may include anything the Court wants to include. Compare, e.g., *National Labor Relations Board* v. *Hearst Publications Inc.*, 322 U. S. 111 (1944) with *Nierotko* v. *The Social Security Board*, 327 U. S. 358 (1946). And see Stern, "Review of Findings of Administrative Agencies, Juries and Courts," 58 *Harv. L. Rev.* 70 (1944); 1 Trowbridge vom Baur, Federal Administrative Law, Cumulative Supplement 12, 36-37, 133-139 (1947); 2 *ibid.* 183, 1855, 195-197. An excellent recent illustration of the British-Canadian view on the subject can be found in *Re Lunenburg Sea Products, Ltd.; Re Zwicker* [1947], 3 D. L. R. 195 (S. Ct. Can.). No judicial review will be granted of Labor Board orders certifying appropriate units, and unions, for collective bargaining purposes. *American Federation of Labor* v.

of words here. We merely remind ourselves that some of the older Supreme Court decisions have vindicated the right to determine the facts *de novo* when they formed the basis of the jurisdiction [120] of the agency,[121] whereas others held otherwise; [122] and that the courts have refused to render "advice" to agencies,[123] because "the award of execution is . . . an essential part of every judgment passed by a court," [124] although declaratory suits have been regarded as cases and controversies.[125] The courts have excluded from their province certain matters such as the question whether a decision of the Civil Service Commission (a so-called independent tribunal) involving a government employee's dismissal, concededly based on a mere "suspicion" rather than facts found, acted lawfully.[126] Yet a suspension, directed by the Government,

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National Labor Relations Board, 308 U. S. 401 (1940); the same is true under the Adm. Proc. Act, *Olin Industries* v. *National Labor Relations Board,* 72 F. Supp. 225, 229 (Mass. 1947). Until the *Rochester Telephone* case, *supra,* "negative" administrative orders were often held non-reviewable. *Piedmont & Northern Ry.* v. *United States,* 280 U. S. 469 (1930). For another instance of non-reviewability see *infra,* note 122.

120 Another ambiguous term, cf. Cook, *Cases and Materials on Equity* (1940), p. 116, note 2, and the literature quoted there.

121 *Crowell* v. *Benson,* 28 U. S. 22 (1932), but see now the *Hearst* case, *supra,* note 119. A strong yearning for the days of *Crowell* v. *Benson*—"a judicial aberration filed and willingly forgotten," Richard Watt, "The Divine Right of Government by Judiciary," 14 *U. of Chi. L. Rev.* 409 (1947)—appears in some vociferous asides of several inferior courts, e. g., *conc. op.* in *National Labor Relations Board* v. *Robbins Tire & Rubber Co.,* 161 F. 2d 798, 801-805 (C. C. A. 5th 1947). And see also *Pittsburgh S. S. Co.* v. *Brown,* 171 F. 2d 175 (C. C. A. 7th 1948).

122 *United States* v. *Ju Toy,* 198 U. S. 253 (1905).

123 *United Public Workers* v. *Mitchell,* 67 S. Ct. 556, 564-565 (1947).

124 *Gordon* v. *United States,* 2 Wall. 561, fully reported 117 U. S. 697, 702 (1864); *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, 697-700 (1927); *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 440 (1923); *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226 (1908).

125 *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227 (1936).

126 *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (1946), cert. den. 67 S. Ct. 979 (1947).

of state officers alleged to have violated the Hatch Act,[127] or in lieu thereof the withholding of funds from the state, was found to be the substance of a case or controversy.[128] And the courts have, indeed, canceled administrative decisions made in exercise of the military power [129] though this is probably the oldest executive prerogative. And so on *usque ad infinitum.*

Supposing for a moment that the term "case or controversy" be capable of proper categorization we must nevertheless observe that administrative agencies have, with the sanction of the courts, for a long time exercised the function of adjudicating matters otherwise falling into a class "by its nature" usually assigned to courts.[130] As we have seen, administrative organs were allowed to punish for crimes.[131] A customs collector could administratively, and without resort to the courts, be forced to pay a balance allegedly due the Government.[132] Property claims arising from Governmental land grants have been decided, with finality, by the Secretary of the Interior.[133] An alien may be deported—which actually means, punished—under the final decision of the Attorney General.[134] We cannot attempt here to list the endless row

[127] 54 Stat. 767 (1940).

[128] *Oklahoma* v. *United States Civil Service Commission,* 67 S. Ct. 544, 550 (1947).

[129] *Sterling* v. *Constantin,* 287 U. S. 378, 402-403 (1932), followed in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 432 (1935); *Duncan* v. *Kahanamoku,* 327 U. S. 304, 314, conc. op. 335 (1946).

[130] Although the Supreme court believed that Congress cannot "either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature is not a subject for judicial determination." *Murray's Lessee* v. *Hoboken Land Improvement Co.,* 18 How. 272, 284 (1855).

[131] Note 98, *supra.*

[132] See case cited note 130, *supra.*

[133] *Walker* v. *Smith,* 21 How. 579 (1858); *Gaines* v. *Thompson,* 7 Wall. 347 (1863); *Ritchfield* v. *Register and Receiver,* 9 Wall. 575 (1869).

[134] *United States* v. *Ju Toy,* 198 U. S. 253 (1905). This has not been changed by the Adm. Proc. Act, *United States ex rel. Trinler* v. *Carusi,* 72 F.

of cases and writings on the more recent trend of the Supreme Court [135] not to disturb the agencies' findings of fact and, indeed, of law.[136] These matters involve, so we are told, administrative problems whereas others involve judicial questions that "must" ultimately be answered by the courts, although some of the latter have actually been left to the executive.[137] In other words, there is not discernible any clearly defined—or unclearly defined at that—matter of which we could say: "This cannot be, and never has been, decided by the executive."

The opposite is equally true. The courts have, as shown above, at various times indulged in arrogating powers that at other times were declared to be "essentially" administrative. This is particularly striking in one field, which the judiciary persistently has claimed never to enter into: Questions involving policy, or administrative discretion. Sometimes this could be rationalized, as it were, by the assertion that the case involved a "political" question and is therefore not cognizable by the judicial power.[138] Mostly, however, it is simply based on the idea that the courts "apply the law," whereas the executive exercises discretion and "makes policy": [139] where

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Supp. 193 (E. D. Pa. 1947). And see *United States ex rel. Eisler* v. *District Director,* 71 F. Supp. 468 (S. D. N. Y. 1947), holding non-reviewable the Attorney General's determination that the relator is a "dangerous alien enemy."

[135] Admirably analyzed by Robert Stern, "The Commerce Clause and the National Economy," 49 *Harv. L. Rev.* 645 & 883 (1946).

[136] *Dobson* v. *Com'r.,* 320 U. S. 489 (1943); *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111 (1944). But see *Trust of Bingham* v. *Com'r.,* U. S. 365 (1945), and *Nierotko* v. *The Social Security Board,* 327 U. S. 358 (1946). As the matter now stands the Court seems to acquiesce in the agency's legal conclusions if it approves them.

[137] The Statute of Sewers, 23 Henry VIII c. 5 (1531), already provided for commissions to make inquiries and punish those who caused annoyances, etc.

[138] *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118, 133 (1912); *Mississippi* v. *Johnson,* 4 Wall. 475 (1867); *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 20 (1831); *Colegrove* v. *Green,* 328 U. S. 549 (1946).

[139] Of the innumerable cases we merely mention: *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, 466-470 (1930); *Old Colony Trust*

there is a question of law [140] there is judicial review, where there is "policy" there is none. Such a distinction overlooks that there is no discretion that would not necessarily be based on law. Thus the discretion of the Federal Communications Commission to grant a broadcasting license only if this is warranted by public convenience, interest, and necessity is authorized by the Communications Act.[141] Consequently, a granting of a license by the Commission despite the absence, or a refusal despite the presence, of public convenience, interest, and necessity is "against the law." That the Supreme Court has decided not to examine the legality of the licensing,[142] has nothing to do with the correctness of the assertion that any discretion exists but by legal grant. It means only that this legal question is not "justiciable," as the Court calls it—not a question which the Court wishes to examine, although it could do so if it wanted.[143] The process of any decision, judicial or administrative, includes the determination of questions of fact and law.[144] Every administrative act [145] is nothing but the

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Co. v. *Com'r. of Internal Revenue,* 279 U. S. 716, 722-725 (1929); *Butterworth* v. *United States ex rel. Hoe,* 112 U. S. 50, 60, 64 (1884); and see Mr. Jackson diss. in *Securities and Exchange Commission* v. *Chenery Corp.,* 67 S. Ct. 1575, 1760, 1763 (1947); Green, "Separation of Governmental Powers," 29 *Yale L. J.* 371 (1920).

[140] Somewhat an extension of the "mere ministerial" duty of *Marbury* v. *Madison,* 1 Cranch 137 (1803); cf. *Gaines* v. *Thompson,* 7 Wall. 347, 352-353 (1869).

[141] Now 48 Stat. 1064 (1934). Cf. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464 (1930).

[142] In *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464 (1930).

[143] Cf. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38 (1936); *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287 (1929); Landis, "Administrative Policies and the Courts," 47 *Yale L. J.* 519, 520-522 (1938).

[144] Hyneman, "Administrative Adjudication," 51 *Pol. Sci. Q.* 383 (1936); *L. B. Wilson, Inc.* v. *Federal Communications Commission,* 170 F. 2nd. 793, 805-806 (App. D. C. 1948).

[145] Except, perhaps, where the state itself operates a business enterprise, Kelsen, *Justiz und Verwaltung* (1929), p. 7.

application of norms—broad or narrow, as the case may be—to a given set of facts, whether it is an order to buy supplies, a directive that certain schools be closed, an increase of price ceilings, or an "adjudication" in a two-party dispute.[146] In many instances the administrative order is narrowly prescribed by law. In others the agency has a comparatively wider "discretion," i.e. the facts upon which the law is to be applied are circumscribed in somewhat more ambiguous terms.

The same is true of the judiciary. The judge (or jury) who is called to decide whether a weapon is dangerous, whether a party's act did or did not amount to an acknowledgment of a debt, whether a husband was cruel, whether there was laches on the plaintiff's part, has some discretion to decide one or the other way, to say nothing of the instances where the legal order employs such terms, *a priori* indefinite, as "reasonable," "adequate," or, indeed, "public policy." Nor can it be maintained that only the executive but not the judiciary branch "makes policy" in the sense of determining the public welfare. To be sure, the administrative organs are more emphatic about their mission to guard the interests of the community than the judges. Yet the latter have many times stressed the public necessity—as the court saw it—as a decisive factor in forming the court's opinion.[147] In other words,

[146] The last-named type of decision is usually called "quasi-judicial." If by this it is merely meant that the agency is organized somewhat like a court, the term is correct. See III, *infra*. But if it is used because of a litigation-like nature of the cases dealt with, the analogy fails, for the courts, too, handle cases that are not necessarily two-party procedures, such as probate or guardianship matters, adoptions, or the supervision of trust funds.

[147] The refusal to allow recovery for nervous shock is not rested on "a logical deduction from the general principles of liability in tort, but a limitation of those principles on purely practical grounds." Holmes, C. J., in *Smith* v. *Postal Telegraph Co.*, 174 Mass. 576, 55 N. E. 380 (1899); *Orlo* v. *Connecticut*, 128 Conn. 231, 21 A. 2d 402 (1941). Cf. Caveat to *Restatement, Torts* § 436. In Sorrell v. Smith [1925] A. C. 700, 716 (H. L.) Lord Dunedin claimed "Ἐν δε φάει καὶ ὄλεσσον—reserve our judgment an it please but at least say something clear to help in the future . . ." because the case, involving a combination to injure another man's trade, was "of great importance . . . for the effect . . . on future cases." Cf. George W. Paton, *A Textbook of Jurispru-*

courts have not often been so outspoken in setting aside rules of law found to be inconsistent with the sense of social welfare, but the subconscious element in the judicial process [148] has nevertheless developed "policy" decisions in every field of judicial law. To hold otherwise would be to expect the impossible, particularly in a system of law where every opinion is a precedent for subsequent ones.[149]

III

Though there is no essential distinction between administrative and judicial matters, there is a factual difference between courts and administrative agencies. It is a gradual difference, to be sure, and not a categorical one, as it must necessarily be in the case of two groups of governmental organs that stand on the same level in the hierarchy of norms. Yet it is a difference that warrants the treatment of the judiciary as an institution somewhat different from the executive. For judges are independent, that is, "subject only to the laws and not to the orders and instructions of superior judicial, or administrative, organs." [150] This does not mean that administrative organs are subject to something beside the law. It does mean, however, that the legal order provides

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dence (1946), pp. 127-128. In *Chisholm* v. *Georgia,* 2 Dall. 419, 450, 451, 453-466, 469 (1793), Justices Iredell, Blair, Wilson, Cushing, and Chief Justice Jay, discussed "the policy of maintaining" suits by individuals against states, the argument *ab inutili,* etc. Equity courts have not only protected political rights—cf. Simpson, "Fifty Years of American Equity," 50 *Harv. L. Rev.* 171, 222-223 (1936)—but have also weighed the interest of the community in granting or denying an injunction against a nuisance, e.g., *Madison* v. *Ducktown Sulphur, Copper & Iron Co.,* 113 Tenn. 331, 83, S. W. 658 (1904).

148 Cardozo, *The Nature of the Judicial Process* (1921), 142 ff.

149 I disagree with Kelsen, "Will the Nuremberg Trial Constitute a Precedent?," 1 *The International Law Quarterly* 153, 154 (1947), who believes that a "judicial decision that merely applies a pre-existent rule of substantive law" cannot have the character of a precedent. Any case that applies a rule of law to a set of facts is sufficiently "new" (since no two facts are identical) to make a precedent.

150 Kelsen, *General Theory of Law and State* (1945), p. 275.

that the inferior administrative organs are also bound by commands from higher organs, whereas courts are not.

This independence of the judiciary has existed in absolute monarchies since the Enlightenment [151] though, of course, merely in fact rather than in law—otherwise the monarchy would have ceased to be absolute—and not without occasional interference on the part of the ruler. In England the judicial independence was legalized under William and Mary.[152] It is part and parcel of our legal order. And where the Constitution speaks of the courts, or the judicial power, it means independent judges. Any organ bound to follow general directives of another organ is thus no court within the meaning of the Constitution. The Supreme Court recognized this dogma at an early date. In *Hayburn's Case,* decided in 1792,[153] the question of a pension for a wounded veteran under an act of the same year [154] arose. § 2 of the statute provided that the circuit court, upon receipt of certain proofs and after having ascertained the nature and degree of the claimant's disability, should " transmit the result of their inquiry . . . to the Secretary at War, together with their opinion in writing," if the applicant should be put on the pension list. § 4 prescribed that then the Secretary should place the name on the list, *provided,* however, " that in any case where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name " from the list and report to Congress. The judges of the Pennsylvania circuit declined to execute the statute and so informed the President; the New York circuit judges complied, but stated that they acted, not as court, but as a commission; and North Carolina,

[151] Kelsen, *Justiz und Verwaltung* (1929), pp. 8 ff.

[152] 13 W. III c. 2 (1701); 1 Bl. *Comm.** 267. The statute allowed judges to hold their commissions, not as before, *durante bene placito,* but *quamdiu bene se gesserint,* and thereby enabled them to resist any attempted influence on the judicature without fear of losing the office.

[153] 2 Dall. 409.

[154] 1 Stat. 243. (The first Act of Congress.)

in a letter to the President, adopted the same view.[155] The Supreme Court (all of whose justices were identical with some of the circuit judges below) had no opportunity to decide the case, as the case at bar became moot. But shortly afterwards[156] the Court did have occasion to confirm the opinion of the circuit judges, *viz.*, that in view of the subjection of the courts' decision to the Secretary's final decree, the power conferred by the statute was not a judicial one; and that, as only "judicial" powers may be vested in "courts," the statute was unconstitutional.[157] This point was succinctly demonstrated by Chief Justice Taney in a similar case, involving statutes providing for the settlement of certain claims arising from the operation of the Army in Florida during or before 1819;[158] the duty imposed on the courts under the 1792 statute, "when the decision was subject to the revision of a secretary and of Congress, could not be executed by the court as a judicial power." Thus the Court, in those decisions, appropriately refrained from going into the—unanswerable, as we have seen—question whether the subject matter of the controversy was "judicial" or "executive" in its nature (it was a money claim) and whether, if the former be true, its assignment to an administrative authority (the judges as commissioners) would not in itself be a violation of the Constitution. They did hold, however, that (a) a court must be independent and (b) that courts may act as courts only, and may not at times be non-courts.

Later decisions have cited these cases frequently but unfortunately the gradual admixture of the natural-law idea that certain matters "by their nature" belong to one and others

[155] 2 Dall., note at 410-414.

[156] *United States* v. *Todd* (1794), reported in 13 How. 52-54 (1851). And see *In re Sanborn*, 148 U. S. 222 (1893).

[157] These, then, are the first cases where federal statutes have been held unconstitutional, and not the more widely publicized case of *Marbury* v. *Madison*, 1 Cranch 137 (1803).

[158] *United States* v. *Ferreira*, 13 How. 40, 49-50 (1851).

to the other group of law-applying organs has darkened the true, functional distinction.[159]

We shall not here attempt an analysis of the many non-independent agencies, semi-independent tribunals,[160] and "legislative" and "constitutional" courts[161] of the Federal and state governments. Nor can we determine whether, as so many lawyers, old and new, have thought,[162] the courts are the true guardians of "liberty" (a term whose meaning in itself differs not only from Moscow to Washington to London, but also from speaker to speaker) or are, conversely, the jealous partisans of "reaction."[163] Certainly, the separation of powers, or of functions, did neither stop slavery or suffrage based on property qualifications, nor prevent deportation proceedings from being "one time a national scandal,"[164] nor naturalization proceedings from being not so much better,[165] nor could it interfere with the judicial murder of Sacco and Vanzetti. These things depend mostly on whether the laws to be executed are good or bad, i. e., desired by the individuals governed by the law, and not whether the organ executing them is a "judge" or not.

[159] See, e.g., Note, 34 *Col. L. R.* 344 (1934), citing *Hayburn* to the effect that courts must not perform "administrative duties," instead of saying that courts must not be subordinated to administrative, i.e., non-independent organs.

[160] Cf. *Humphrey's Executor* v. *United States,* 295 U. S. 602 (1935), holding a Federal Trade Commissioner irremovable during his term of office, overruling in part *Myers* v. *United States* 272 U. S. 52 (1926).

[161] Note, 34 *Col. L. Rev.* 344 (1934).

[162] See Roscoe Pound, Annual Survey of Law, 33 *A. B. A. J.* (1947); the same, *The Separation of Powers—A Fundamental American Principle* (1945).

[163] F. K. Bentel, "The Problem of Reforming Administrative Procedure," 6 *Fed. Bar J.* 264, 281 (1945), speaks of the "unproved assumption that somehow or other judicial interference with government activities insures justice."

[164] Ralph F. Fuchs, "Concepts and Policies in Anglo-American Administrative Law Theory," 47 *Yale L. J.* 538, 563 (1938); Carol King, "Treatment of Lawyers in Two Wars," 5 *Nat. Law. Guild Rev.* 208 (1945).

[165] See the angry comment of Judge Rifkind in *Petition of F.,* 73 F. Supp. 665 (S. D. N. Y. 1947), and the facts and attitude of the administrative agency in *Petition of Smith,* 71 F. Supp. 968 (N. J. 1947).

Concededly, however, the human quality of those concerned with law enforcement is of importance, too. Independence in office, if everything else be equal, creates independence of spirit and mind, and forthrightness. It improves the character. Should, therefore, as many matters as possible be taken away from the executive and given to the judiciary? By no means! It is the executive that ought to be vested with greater independence in order to insure the administration of the law in a judicial spirit. This, and only this, is in accordance with the modern trend of law.[166] At first only the courts, i. e., law-applying organs concerned mainly with crimes and questions of property, enjoyed independence. Gradually, however, boards and commissioners [167] have been set up everywhere to deal with the more complicated problems of non-judiciary law. At the same time, with the partial abolition of the spoils system, the administrative personnel is being given a yet embryonic degree of security,[168] which is the fundament of independence. It cannot yet be achieved everywhere. It has no room in the military and little room in the diplomatic branches of government. However, even as equity turned from administrative [169] to court-administered law, the same evolution happens in many other branches of the law: Not the executive "encroaches" on the judiciary, but the former asymptotically approaches the latter.

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166 The Senate Report, reprinted under the title, "Independence of Judges: Should They Be Used for Non-Judicial Work," 33 *A. B. A. J.* 792 (1947), is totally unaware of this historical process. The report particularly attacks the practice of appointing federal judges to non-judicial posts. Yet this does not deteriorate the judiciary but merely improves the executive.

167 In this country the start seems to have been made with the I. C. C. Cf. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447 (1894).

168 "The civil servants [in America] are treated as no individual would treat those on whose service he relies." Albert F. Pollard, *The Evolution of Parliament* (2. ed., 1926), p. 256.

169 *Ibid.,* at p. 245.

Cases and Studies

SECULARISM OF WILLS

"Secularism is a view of life that limits itself to the human here and now in exclusion of man's relation to God here and hereafter."

Such was the definition set forth in a statement on Secularism issued by the Catholic Bishops of the United States at their annual meeting in Washington in November 1947, wherein it was declared: "Secularism, or the practical exclusion of God from human thinking and living, is at the root of the world's travail today." The bishops particularly stressed the evils of secularism in its impact on the individual, the family, society, and the nation, with special emphasis as to the harm done to education by the exclusion of God from the school.

At their annual meeting in 1948, the Catholic Bishops of the United States in a general statement titled "The Christian in Action," asked Christians for a constructive effort to counteract Secularism "in every phase of life where individual attitudes are a determining factor—in the home, in the school, at work and in civil polity."

Herein, it is our purpose to show the decline in the exercise of the virtue of charity by individuals and the trend towards state paternalistic socialism caused by the exclusion of God from testamentary disposition of goods accumulated by men in their lifetime, with respect to format, content, and jurisdiction of Wills.

We may make a beginning with *The Fifty Earliest English Wills in The Court of Probate, London, A.D. 1387-1439.*[1] In twenty-one of these wills the testators began with these words: "In the name of God, Amen."[2] The first phrase of thirteen of these wills was "In Dei nomine, Amen."[3] The opening words of five of the wills were:

[1] Copied and edited from the Original Registers in Somerset House, by Frederick J. Furnival, London. Published for The Early English Text Society, by Trubner & Co., 1882.

[2] Wills numbered: 1, 4, 6, 9, 13, 19, 21, 24, 26, 27, 29, 31, 32, 33, 38, 39, 40, 41, 42, 45, and 47.

[3] Wills numbered: 3, 5, 7, 8, 10, 15, 18, 22, 28, 30, 35, 48, and 49.

"In the name of the Father, and the Son, and the Holy Ghost."[4] One recited: "In the name of the Lord of all Lords, the Almighty Immortal Trinity."[5] One began: "In nomine sancte & indiuide Trinitatis, patris et filij et spiritus sancti, Amen."[6] One: "In the name of the Holy Blessed Trinity."[7] And one: "In the name of our Lord Jesus, Amen."[8] The collection of fifty wills contained six incomplete wills which had no introductory clauses. In every complete will the name of God was the most prominent. All of them were the documents of lay persons.

The compiler added one will of a priest in these words: "With a priest's (will) of 1454." This was set forth as the will of Nicholas Sturgeon, Priest. It began:

> In the blessyd name of the holy trinite, the Fader, the sone, the holy gost, three persons in oon substaunce, the last day of the Moneth of May, in the yere of Incarnacioun of our lorde Ihesu Crist a M' cccc liiij, And in the yere of the Reigne of Kyng Harry the vj after the conquest xxxij, I Nicholas Sturgeon, preest, . . .[9]

In forty-one of the wills the very first provision was: "I bequethe my sowle to God."[10] Practically every will of the period contained spiritual provisions.

Speaking about restrictions on testators in the matter of disposing by will of his *personal* property, Blackstone says:

> But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. Glanvil will inform us[11] that by the common law, as it stood in the reign of Henry the Second [1154-1189], a man's goods were to be divided into three equal parts: of which one went to his heirs or lineal descendants, another to his wife, and the

[4] Wills numbered: 12, 14, 20, 43, and 50.

[5] Will numbered: 11.

[6] Will numbered: 25.

[7] Will numbered: 34.

[8] Will numbered: 46.

[9] Will numbered: 51.

[10] In some instances this provision would be in the Latin form: "In primis lego animam deo." Wills numbered: 1, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50.

[11] L. 2, c. 5.

third was at his own disposal; or, if he died without a wife, he might dispose of one moiety, and the other went to his children; and so *e converso,* if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.[12]

The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them.[13]

This continued to be the law of the land at the time of the *magna carta,* which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased; and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis*"[14] In the reign of King Edward the Third [1327-1377] this right of the wife and children was still held to be the universal or common law; though frequently pleaded as the local custom of Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly[15] in the reign of Charles the First [1625-1649] to be the general law of the land. But this law was altered by imperceptible degrees and the deceased may now by will bequeath the whole of his goods and chattels.[16]

The first of these earliest English Wills was that of Robert Corn, a citizen of London. Apparently he was a widower and left a son, Watkyn, and two daughters, Katherine and Genet. By his will he divided his personal property into two parts. One part he gave to his son, Watkyn, and daughter, Katherine. He specifically bequeathed to his daughter Genet, 40 shillings. The residue he gave for religious and charitable uses. Robert Corn's will provided 6 specific bequests for the advancement of religion and 2 for the relief of the needy. One specific item was: "Also [y be-quethe] to eueri prest that ys of this [our lady of Abbechirch] chirch, ij s."

Only a portion of the second will, that of John Pyncheon, a jeweller of London, was set out by Furnivall. The will was dated September 20, 1392, and was in French, but the charitable bequests were set forth in English. John Pyncheon made specific provisions for the relief of the needy and for the advancement of religion. Among the items was: "And where men may a-spye eny powre man

[12] Bracton, 1, 2, c. 26; Flet. i, 2, c. 57.

[13] F. N. B. 122.

[14] 9 Hen. III, c. 18.

[15] Law, 175.

[16] Cf. 2 Blackstone's *Commentaries* 492.

of religion, Monke, Chanon, or Frere, that they han of my god the gode, And ben powre, eche Man vj. s. viij. d. that ben Prestys."

The third will was that of Lady Alice West, of Hampshire, made in 1395. For the advancement of religion Lady Alice provided over thirty specific bequests, and for the relief of the needy she provided for each of the poor tenants where she owned the property.

All the remaining wills made similar bequests for purposes which we now deem to be charitable: the relief of poverty, the advancement of education; the advancement of religion; the promotion of health; for governmental or municipal purposes; and for other purposes the accomplishment of which is beneficial to the community. These particular fifty wills were written in English. The many wills written in either Latin or French were not made part of this compilation.

Any of the other wills taken at random would show similar bequests for charitable uses. For example, the will of John Plot, 1408, provided that the executor was to make an offering of 20 pounds to a priest to keep the testator's "yer's mind" for twenty years; 40 pence was to be given to each of the poor; 10 marks for maidens on their marriage; and 5 pounds for the mending of bad roads between London and Ware. Thomas Walwayn made a will in 1415 and provided for the sale of some land with one-third of the sale-money to build the steeple of Marcle Church, one-third to the poor prisoners (in prison for non-payment of debts), one-sixth to the neighboring poor, one-sixth for the marriage of young women and for 1,000 Masses. He also provided for the restitution of any ill-gotten gains.

There was but one religiously organized society in England at this time, The Roman Catholic Church. The people, as a whole, were especially devoted to the Church and were obedient to its doctrines. In 1377 Pope Gregory IX had left Avignon for Rome where the Popes have resided continuously ever since his departure from Southern France. Early in the fourteenth century St. Paul's Cathedral, in London, had been completed. A very high steeple, surmounted by a cross, had been erected as a result of the voluntary offerings of the faithful. Its chapter consisted of the dean, the precentor, the treasurer, the chancellor, the prebendaries, the latter numbering at the time approximately 30, all endowed. Twelve petty canons and six vicars choral and fifty chantry priests were attached to the cathedral about this period.

The great plague of 1349, the Black Death, had carried off one-half of the population of England, including most of the farm laborers. Immediately thereafter, English feudalism began to decline rapidly. Under the old system farm laborers did not receive money wages for their work. They tilled for their own account small pieces of land owned by their superior lord, giving in return for this privilege their services in working other land of their lord. The old villeins became hired laborers under the new system, the lord became a landlord, and the former villeins became tenant farmers or landless laborers serving under a contract of employment. With the resultant scarcity of labor, sharp conflicts arose between capital and labor over conditions of employment and wages, leading up to the Peasants Revolt, which disturbed not only England but nearly all of Europe. Richard II was only 16, when in 1381, one Wat Tyler led the peasants of Kent in an uprising and marched on London burning houses and killing many of King Richard's men. This revolt was quickly put down, however, and after Tyler had been stabbed to death by one of Richard's soldiers, the peasants went back to their homes again, and the strike with its violence was over.

Shortly afterwards, an outstanding personality arose in London, Sir Richard Whittington. He became Mayor of the city in 1397, 1406, and 1419. In his regime Newgate, Christ's Hospital, and a large part of St. Bartholomew's Hospital, and the Chapel and the library at the Guildhall were constructed.

Richard II was King of England at the time the wills of Robert Corn, John Pyncheon and Lady Alice West were made. Henry IV, Henry V, and Henry VI were the kings at the time of the execution of the remaining early wills set forth by Furnivall. The relations between the Church and State at this time continued to be good. The people were predominantly of the Catholic Faith. They exercised their religion with no appreciable interference by the State.

The Church maintained that it was a *Societas Perfecta,* a Sovereign Society, with exclusive jurisdiction over spiritual matters and over temporal matters annexed to spiritual matters. Bracton, in the first half of the thirteenth century, had set forth the common boundary of the field of jurisdiction of the Church and of the field of jurisdiction of the State in the following words: " Ad papam et ad sacerdotium quidem pertinent ea quae spiritualia sunt, ad regem et ad regnum ea quae temporalia." As to the respective jurisdiction of

the Church Courts and the State Courts, Bracton declared: "pertineat ad forum ecclesiasticum . . . in causis spiritualibus vel spiritualitati annexis." [17]

Dean Pound says:

> In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental. It seemed as natural to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount, as it seems to Americans to have two sets of courts, federal courts and state courts, operating side by side in the same territory, each supreme in their own province . . .[18]

The full and exclusive jurisdiction [19] of the ecclesiastical courts in matters dealing with the probate of wills was firmly established before the end of the fourteenth century.[20]

By the Acts of Uniformity, 1549 and 1559, the celebration of the Mass was no longer tolerated in England. It became illegal in that country by virtue of these Acts, and later in 1581 it became a penal offence for a priest to say Mass and a penal offence for a layman to attend Mass and these two acts continued to be "crimes" until 1791, and it was not until the Catholic Relief Act in 1829 that the Roman Catholic Church was again given the status of being tolerated in England.

In 1601, shortly before Queen Elizabeth died, Parliament enacted what is now well known as the Statute of Charitable Uses. This statute authorized the Anglican bishops of each diocese to investi-

[17] Bracton, Henrici de, *De Legibus & Consuetudinibus Angliae Libri Quinque* (Londini: Apud Ricardum Totellum, 1569), fol. 401b, and 416b.

[18] Pound, R., "A Comparison of the Ideals of Law," 47 *Harvard Law Review* (November 1933), 1, at 6. For a more detailed analysis of the respective jurisdictions of the Catholic Church and the State, cf. O'Brien and O'Brien, "Pennsylvania's Wills Act of 1947 and Separation of Church and State," 52 *Dickinson Law Review* (1948), 79-109.

[19] With the exception of a few manorial courts.

[20] Cf. Glanvill, L. 7, c. 8; *Magna carta* (John), Sec. 27; Stat. 31 Edw. III, c. 11; Coote, *Ecc. Prac.* 21-58; 3 Seld. Op. 1678-1681; *Dyke* v. *Walford*, 5 Moo. P. C. 434.

gate cases where property had been given for charitable purposes,[21] and to make such orders, judgments and decrees as should be necessary to carry out the purposes for which the donors had given the property, which orders, judgments and decrees were to be valid and of legal force and effect until altered by the chancellor. In short, the Statute provided machinery for the enforcement of charitable trusts. The Statute, however, soon fell into disuse. But its preamble, containing an enumeration of charitable purposes, was to exert judicial influence for centuries. In this enumeration of charitable purposes the *advancement of religion* was not included. The draftsman of the Act, Sir Francis Moore, explained this omission as follows:

> The gifts intended to be employed upon purposes grounded upon charity, might, in change of times (contrary to the minds of the givers) be confiscated into the king's treasury. For religion being variable, according to the pleasure of succeeding princes, that which at one time is held to be orthodox, may at another be accounted superstitious, and then such lands are confiscated.

The Statute, *inter alia*, classified as charitable, gifts for the "repair of . . . churches." This was its only specification of what gifts for the advancement of religion were charitable. The Statute included among charitable purposes the relief of aged, helpless and poor people, schools of learning, repair of bridges, ports, highways, marriages of poor maids, aid and help for young tradesmen, handicraftsmen and persons decayed and the aid or ease of any poor inhabitants concerning payments of fifteens and other taxes. In a short time after its enactment the *judiciary* began to supply for the omissions of the legislature in the matter of gifts for the advancement of religion. In 1639, it was held in the case of *Pember* v. *Inhabitants of Knighton*[22] that a gift to support a preaching minister of the established church was charitable. The English courts, of course, did not declare as charitable gifts for the support of priests of the Roman Catholic Church or of rabbis of the Jewish faith, religions not tolerated by law.

In 1754 in the case of *Da Costa* v. *De Pas*, a Jew left by will a certain sum to be applied toward establishing a Jesuba or assembly

[21] Others were also authorized to conduct said investigations.

[22] Duke, *Law of Charitable Uses* (1805), 381.

for reading the Jewish law and instructing the people in the Jewish Religion. The court ruled that the gift was not charitable, deciding that an illegal trust had been created, and decreed that the king might apply the fund under the doctrine of *cy pres* to other charitable purposes. Accordingly, practically the entire fund was applied to the support of a minister of the established Anglican religion. This was an outrageous decision.[23]

In 1835, an English Court in the case of *West* v. *Shuttleworth*[24] decided that a bequest for Masses was illegal as a superstitious use and of course not charitable. In 1862 in the case of *Thornton* v. *Howe*[25] an English court held that a gift of property to be applied to the "propagation of the sacred writings of the late Joanna Southcote" a person who had declared that she was with child by the Holy Ghost and that she was to give birth to a second Messiah, but who had died without issue, was charitable.

In 1919, although the House of Lords in *Bourne* v. *Keane* overruling *West* v. *Shuttleworth*, decided that gifts for Masses were not void as being superstitious, it failed to decide whether or not such gifts were charitable. In 1934, however, it was held in England in *In re Caus*[26] that a gift for Masses was a *charitable use*. The case was tried on the theory that the testator, Father Caus, had created a trust which would be void as in violation of the rule against perpetuities unless the gifts were saved as being for a charitable purpose. The statement of Dr. Delaney, filed as a supplemental answer in the Case of *Attorney General* v. *Delaney*[27] was admitted by agreement

[23] 1 Amb. 228, 27 Eng. Rep. Repr. 150 (1754). From 1758 to 1781 Richard Challoner, the 18th-century Bishop of London in the dark days of Catholic eclipse in Britain, had charge of some 25,000 Catholics. He was poor, shabby, despised and lonely. For a time there was a price of 100 pounds on his head and he was forced into hiding. He was a prolific writer, responsible for the Challoner edition of the Bible; he is also known as the author of the most famous of all English prayer books, "The Garden of the Soul."

[24] 2 Myl. & K. 684; quickly followed by *Heath* v. *Chapman*, 2 Drew 417 (1854); *In re Blundell's Trusts*, 30 Beav. 360 (1861); *In re Fleetwood*, 15 Ch. D. 594 (1880); and *In re Elliott*, 39 W. R. 297 (1891), all to the same effect.

[25] 31 Beav. 14.

[26] (1934), Ch. 162. For the *Bourne* v. *Keane* decision, cf. Appeal Cases, L. R. 815.

[27] (1906) 1 I.R. 247, 260, 261. Dr. Delaney was Lord Bishop of Cork.

as evidence in the trial of the case, first as to the nature of the Mass, and secondly as to the nature of money received by a priest who says the Mass. The decision in the Caus case that gifts for Masses are charitable because they advance religion definitely settled the law in England that gifts for Masses are always for a charitable use. The great weight of authority in the United States is that gifts for Masses are always for a charitable use. The now repudiated English doctrine as to invalidity of gifts for Masses on the ground of their being for a supersititious use has never prevailed in the United States.

From the time of the Acts of Uniformity, in 1549 and 1559, to the year 1919 when the House of Lords rendered their decision in the case of *Bourne* v. *Keane*, a period of three hundred and seventy years, wills of English Catholics were completely secularized insofar as bequests for Masses are concerned as the result of the legislative inhibition and judicial decrees.

American Wills, taken by chance from the files of the Probate Courts in the cities of Los Angeles, California, and Chicago, Illinois, have been inspected by the present writers. The first ten wills filed in the month of June, 1947, in the Superior Court of the County of Los Angeles, California, were examined.[28] The introductory clause of two of these ten wills was as follows: "In the Name of God, Amen." These were the wills of Lorinda Esta O'Sullivan and of Joseph O'Bryant. In none of the other eight wills and in no other part of the aforesaid two wills was the name of God mentioned. In not one of the ten wills was there a bequest for the advancement of religion or for any of the charitable purposes for which the testators in the Fifty Earliest English Wills had so faithfully provided.

An additional sampling of wills in Los Angeles, at random, was made by inspection of all wills filed for probate in the Superior Court of that County on December 29, 1947. Eighteen of these were examined. In the introduction of only four was the name of God mentioned, and each of these had the heading: "In the Name of God, Amen." In none was there any bequest for the advance-

[28] Will of Edward H. Price, 270015; Will of Mary Doyle, 270026; Will of Margaret Agnes Gilligan, 270029; Will of Mary Louise Gaynor, 270031; Will of Lynn K. Strong, 270041; Will of Lorinda Esta O'Sullivan, 270042; Will of Othniel Everett Smith, 270045; Will of Joseph O'Bryant, 270047; Will of Benjamin Edwin Kennedy, 270050; Will of Ida Waters, 270051. (The numbers missing in the file sequence represent Guardianship and Trust cases.)

ment of religion. In only one was there a bequest for a charitable purpose. The will of a Jew [29] and the will of a Catholic were the exceptional ones. The Jew's will contained the following bequests: $100.00 each to the American Red Cross, the Los Angeles Community Chest, the Jewish National Fund and Mount Sinai Hospital.

The Catholic's will [30] recited:

> In the Name of God, Amen . . .
>
> Section 4: It is my request and desire that my funeral shall not take place until fully forty-eight hours shall have elapsed after my death. It is my further wish and desire that . . . the religious services in connection with my funeral shall be held at the Cathedral of St. Vibiana, . . . and it is my request that my dear old friend Rt. Rev. Msgr. John M. McCarthy, D.D., Pastor of St. Andrew's Church, Pasadena, California. deliver my funeral eulogy, and as my dear father and I built the Cathedral and turned it over to the Right Reverend Bishop Thadeus Amat, D.D., of blessed memory, without one cent of indebtedness, I ask our good and much beloved Most Reverend Archbishop, D.D., permission that my body lie in state in the Cathedral near the main front door from 2 o'clock, P.M., until 5 o'clock, P.M., and thence that my body be returned back to the funeral parlors . . .

In a similar manner all the wills filed in the Cook County Court House, at Chicago, Illinois, from the first day of January, 1948, to the fifth day of said month, were duly examined. There were twenty-nine of such wills. Of these twenty-nine, seven only mentioned the name of God, directly or indirectly. Of these seven, four confined such mention to the introductory provision, merely reciting that they were being made " In the Name of God," and two of these were on a printed form with this phrase already thereon. The other three references were in the wills of Catholics who provided in the bodies of their wills for the advancement of religion: two made bequests for Masses, the offerings of which are always for the support of priests; the other made a gift to a member of the Society of Jesus, often known as the Jesuit Order. Only six of the twenty-nine wills

[29] *Estate of Kamp,* 272211.

[30] Estate of Joseph Mesmer, 277195. The other Wills examined were: Dusenbury 277196; Chorna, 277197; Benson, 277198; Hubbard, 277202; Smythe, 277208; Dalton, 277210; Smith, 277212; Coyle, 277214; Steward, 277221; Archer, 277219; Lamb, 277222; Richardson, 277225; Lindemann, 277228; Blumenthal, 277233; Manley, 277234; Richards and Sullivan (examined before file numbers were assigned).

contained gifts for a charitable use and two of these were by Jews and three by Catholics. Thus twenty-three of the twenty-nine wills contained no bequests or devises for charitable purposes.

According to a contemporaneous press report, the director of Lutheran welfare agencies in the New York metropolitan area stated that up till about seventy-five years ago the history of the church was the story of rich and poor alike remembering the part charity must play in the life of the Christian. But today we give, he stated, only one-third as much as our fathers did, and do it through community funds. In this kind of city (New York), he added, the 'community fund philosophy' fits only too well. Men can look right past our brothers caught in distress because they are lumped all together once a year.[31]

The Wall Street Journal, in the leading editorial of its issue of March 2, 1948, titled "Collectivist Charity" said, in part:

> Our charity has gone collectivist. Individual responsibility is being deadened. We turn to government for our hospitals and medical care, for our education, for our relief for the needy and unfortunate. The tax collector is rapidly becoming the bearer of the mite box and the alms dispenser as well.
>
> This process of collectivizing charity has two causes. The first and most important is the weight of present-day taxation, especially that in the middle and higher income brackets. Another is the ambition of government, federal and local, to take over responsibilities which used to rest on the individual. The means to discharge these responsibilities, of course, governments must take from the citizens who would otherwise have the means. There is no other source.
>
> The loss is spiritual, but is more than that. For what comes back is not necessarily what the particular community needs, but rather what some stranger thinks it ought to have. The community that loses responsibility also loses control of what is done for it.
>
> It is still true—even if it is a cliché—that charity begins at home. Citizens ought, in an individual and personal way, to take responsibility for the welfare of their own communities. They can fit assistance to need better than can any federal or state or municipal bureau. As things are, however, they have not the means with which to do these works themselves, nor can they really know how nearly the official sources of aid, into which portions of their tax payments go, are providing for their needy and distressed.
>
> One thing is certain. Private philanthropies and collectivized welfare work cannot both flourish.

[31] *New York Times*, February 16, 1948.

It is submitted that neither the "community fund philosophy" nor any so-called "modern political philosophy" warrants the secularism of wills of either laymen or clerics. Certainly no will of a Catholic priest should be tainted with secularism.[32]

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THE RIGHTS OF THE FAITHFUL IN A PUBLIC ORATORY

Just how is the phrase *"legitime comprobatum"* in canon 1188, § 2, 1°, to be understood? Does it imply a need on the part of the faithful to furnish proof of their right to frequent a public oratory? Does it point to their possession of this right on condition that the basis for this right, namely the public status of the oratory, has been duly established by proof? Or does it simply characterize their possessed right as a prerogative which the law vindicates for them? From the grammatical structure of canon 1188, § 2, 1°, any one of these meanings seems admissible, but surely the phrase must seek to denote but one set and fixed meaning.

Anceps

Can. 1188, § 1.—Oratorium est locus divino cultui destinatus, non tamen eo potissimum fine ut universo fidelium populo usui sit ad religionem publice colendam.

§ 2.—Est vero oratorium:

1°.—*Publicum,* si praecipue erectum sit in commodum alicuius collegii aut etiam privatorum, ita tamen ut omnibus fidelibus, tempore saltem divinorum officiorum, ius sit, legitime comprobatum, illud adeundi.

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[32] *The New York Times* of November 28, 1948, said: "Twelve years after the Federal government set up an old-age insurance program to free the aged from the need for public charity, taxpayers are spending seven times as much to provide relief for the needy as they did in the last year before the insurance program (Social Security) began operating. The cost of old-age relief will exceed $1,100,000,000 this year as against $155,241,000 it cost in 1936. This is not the only measure of the insurance program's failure to achieve its goal of helping to eliminate destitution in old age." It may also be noted that *The New York Times* for December 3, 1948, p. 19, indicated that amendments to the Social Security Act to be proposed at the next session of Congress may call for the coverage of clergymen and ministers of religion of all denominations. This, it is submitted, is a further infiltration of secularism into religion.

In a dissertation which treats the topic of oratories,[1] it was contended with reference to a public oratory that " all the faithful have the right—when legitimately established—to frequent it, at least at the time of divine services," and that " the Code states that the right of the faithful must be legitimately established, that is, it must be lawfully proved—' ius legitime comprobatum '." [2]

It was further explained that " the perfect participle ' *comprobatum* ' is used predicatively and as such must be interpreted here as representing a subordinate clause, either conditional or temporal." A list of authors was cited in support of this statement, and then the author himself continued: " In fact, Woywod seems to be the only author who considered it [the word *comprobatum*] used attributively, as he evidently does when he translates the passage in question by: ' All the faithful have a legitimately established right (*Commentary,* II, n. 1225 [New York: Joseph F. Wagner, 1925]).' His rendition in a previous work (*The New Canon Law,* n. 1031 [New York: Joseph F. Wagner, 1918]) is equally inaccurate." [3]

It is indeed true that this interpretation has been espoused by a number of authors, but one may question the propriety of classifying with them Blat and Vermeersch, who were cited in support of the proposed doctrine. Blat paraphrased " *legitime comprobatum* " with " *ad normam ss. canonum fundatum,*" [4] and Vermeersch wrote: " Omnis interpretationis difficultas est in explicatione vocis *ius.* Vox ista stricte intellegitur a C. Gasparri [*De Eucharistia,* I, n. 188, 190], ita ut inde colligat oratorium publicum non posse esse in privato alicuius dominio, ea saltem ratione qua dominus possit fidelibus accessum et recessum iure impedire. Consonat responsum S.C.C. *in Tusculana,* 13 Nov. 1626, allegatum a C. Gasparri, I, 192, quod postulavit instrumentum quo Cardinalis se obligaret ad permittendum liberum ingressum in perpetuum. Atque huic severitati favet ipse Codex, dum postulat ius *legitime comprobatum.* Ius tamen istud

[1] Feldhaus, *Oratories,* The Catholic University of America Canon Law Studies, N. 42 (Washington, D. C.: The Catholic University of America, 1927).

[2] *Op. cit.,* pp. 70 and 72.

[3] *Op. cit.,* p. 70, footnote 20.

[4] *Commentarium Textus Codicis Iuris Canonici,* Liber III, *De Rebus,* Partes II-VI (Romae: Ex Typographia in Instituto Pii IX, 1923), p. 50, n. 40.

populi esse non debet respectu auctoritatis ecclesiasticae: huic enim integrum est etiam ecclesiam claudere populo."[5]

In these excerpts there appears little if any warrant for counting them as supporters of the view that was attributed to them.

One can point to the fact that the ways which may serve to establish proof that the oratory is a public oratory or that the faithful are vindicated in their right to use it have been searchingly explained by a number of authors.[6] Perhaps the most outspoken among these was De Meester, who wrote: "Jus ita stricte intelligendum videtur, ut nemo, praeter competentem ecclesiasticam auctoritatem possit fidelibus accessum et recessum iure impedire. Jus illud fidelium legitime comprobatur per documentum erectionis canonicae, per instrumentum quo dominus se obligat ad liberum aditum cuique fideli permittendum, per praescriptionem, *per publicum usum.* In *dubio* autem publicum habebitur, si adsint signa publicitatis, quorum praecipua sunt: ianua publica et campanile, beneficium annexum, sollemnis consecratio, publicae conciones, etc."[7] Perhaps one may say that these authors stress in the main the possession by the faithful of the right on condition that the basis for this right has been duly established and vindicated for them through acceptable proof.

But there are other authors who, once it is granted that the oratory is a public oratory, bespeak an established right for the faithful in general to frequent it, at least at the time of divine services. It will suffice to reproduce here a few short excerpts.

[5] *Epitome Iuris Canonici,* II (5. ed., Mechliniae, Romae: H. Dessain, 1934), pp. 345-347, n. 498. It should be stated that Vermeersch was cited from the 2. ed., 1925. It is here assumed that his doctrine as given in the 5. ed. is not divergent from that given in the 2. ed.

[6] Cf. Berutti, *Institutiones Iuris Canonici,* IV (Taurini: Marietti, 1940), p. 81; Beste, *Introductio in Codicem* (Collegeville, Minn.: St. John's Abbey Press, 1938), p. 572; Sipos, *Enchiridion Iuris Canonici* (3. ed., Pécs: Ex Typographia "Haladas R. T.," 1936), p. 669, footnote 2; Cappello, *Summa Iuris Canonici,* II (2. ed., Romae: Apud Aedes Universitatis Gregorianae, 1934), p. 315, n. 682; Claeys Bouuaert-Simenon, *Manuale Juris Canonici,* III (4. ed., Gandae et Leodii: In Seminariis Gandavensi et Leodiensi, 1934), p. 18, n. 25; Vidal, *Ius Canonicum,* Tom. IV, Vol. I (Romae: Apud Aedes Universitatis Gregorianae, 1934), pp. 472-473, n. 377.

[7] *Juris Canonici et Juris Canonico-civilis Compendium,* Tom. III, Pars I (nova editio, Brugis: Desclée de Brouwer, 1926), p. 50, n. 1147.

" Est vero oratorium *publicum,* quod erectum est . . . secundario in commodum omnium fidelium, qui ius habent *strictum,* tempore saltem divinorum officiorum, illud adeundi." [8]

" Videtur oratorium publicum ab oratorio semi-publico vel privato in hoc essentialiter distingui, quod legitima auctoritas concessit omnibus fidelibus ius illud adeundi saltem tempore divinorum officiorum."[9]

. . . but open at least during religious services to all the faithful, who have a well-established right to use it." [10]

" Öffentlich ist eine Kapelle welche zunächst für den gottesdienstlichen Gebrauch einer Kommunität oder auch Privater errichtet wird, bei der jedoch alle Gläubigen *das gesetzlich erweisbare Recht haben,* dieselbe, wenigstens zur Zeit des Gottesdienstes, zu besuchen." [11]

" Man unterscheidet: 1. Öffentliche Oratorien, welche zunächst für ein Kollegium oder für Privatpersonen (Familien) errichtet sind, aber wenigstens zur Zeit des Gottesdienstes allen Gläubigen *von Rechts wegen* (*nicht aus Gnade oder Widerruf*) frei und öffentlich (von einem öffentlichen Wege oder Platz aus) zugänglich sind." [12]

" Man unterscheidet: 1. das Oratorium publicum, wenn es hauptsächlich errichtet ist zum Nutzen eines Kollegs oder auch von Privatpersonen, jedoch so, dass alle Gläubigen wenigstens zur Zeit des Gottesdienstes *das gesetzmässig garantierte Recht haben,* dasselbe zu besuchen. Wer also ein Oratorium publicum errichten will, muss sich verpflichten, den Gläubigen Zutritt zum Gottesdienst zu gewähren. Ein subjektives Recht der Gläubigen wird jedoch dadurch nicht erworben, so dass die kirchliche Behörde Einschränkungen treffen kann. Ein öffentlicher Ausgang auf die Strasse ist nicht

[8] Ferreres, *Institutiones Canonicae* (2. ed., 2 vols., Barcinone: Subirana, 1920), II, 38.

[9] Prümmer, *Manuale Iuris Canonici* (4.-5. ed., Friburgi Brisgoviae: Herder, 1927), p. 448, q. 366.

[10] Ayrinhac, *Administrative Legislation* (New York: Longmans, Green and Co., 1930), p. 41.

[11] Leitner, *Handbuch des Kirchenrechts,* 5. Lieferung (München: Verlag Josef Kösel und Friedrich Pustet, 1927), p. 398. (Italics added.)

[12] Eichmann, *Lehrbuch des Kirchenrechts* (2. ed., Paderborn: Schöningh, 1926), p. 413. (Italics added.)

unbedingt vorgeschrieben, jedoch muss der Zutritt zum Gottesdienst jedermann freistehen." [13]

From the foregoing it is clear enough that one cannot any longer point to Woywod as standing alone in the claim that "*legitime comprobatum*" evinces an established right. It rather seems that the majority stands with him. But it is not primarily any majority opinion that decides in what the correct interpretation consists. One can marshal more convincing arguments than that.

First of all, "legitimately proved" is but one of the possible ways for translating the phrase "*legitime comprobatum.*" *Comprobare* is of course used in the sense of to show, to evince, to prove, to demonstrate, in quite a number of canons in the Code.[14] But it can also have the meaning of to sanction, to confirm, to approve, to recognize, to acknowledge, to guarantee, to vindicate.[15] And this is indeed the sense that the very context of canon 1188, § 2, 1°, seems to call for. As previously mentioned, Blat substituted "*ad normam ss. canonum fundatum*" as an equivalent for "*legitime comprobatum.*" Blat's paraphrase is practically the refrain of a similar phrase, "*intentio in iure fundata*", as found in canon 1432, § 1, which acknowledges for the bishop in his diocese the prior right and claim to the filling of vacant benefices through his appointment of their incumbents. In a similar way the faithful have a claim, as established by law, to frequent a public oratory.

Secondly, it appears to be a baseless argument to insist that *comprobatum* needs to be understood predicatively, and not attributively, with reference to the word "right." As a past participle, the word *comprobatum* points to something that has been accomplished or achieved and is in effect, rather than to something that still needs to become accomplished or achieved in order to gain effect. In the latter supposition, why wouldn't the legislator have employed instead the very natural form of *comprobandum?* The gerundive form would have been admirably suited for that purpose, and the Code indeed employs that form voluminously when it wants to point to a purpose that remains to be achieved.

[13] Hilling, *Das Sachenrecht des Codex Juris Canonici* (Freiburgi. Br.: Josef Waibel, 1928), pp. 119-120. (Italics added.)

[14] Cf. e.g., cans. 51; 779; 800; 1096, § 2; 1792.

[15] Cf., e.g., cans. 1795 ("*qui idonei fuerint comprobati*") and 1833, § 2 ("*iudicia et argumenta usu comprobata*").

Thirdly—and this appears as an incontestable argument—is it logically possible to call upon the faithful to bring proof of the possession of their right for the very purpose of evincing their possession of it? There are times when one is called on to prove the possession of some right before one becomes entitled to use it, but not before one gains possession of it. The possession must precede the proof; it is a necessary postulate if any proof is to follow. It is a "begging of the question" to call upon someone to establish proof for what he possesses in order that he may gain possession of what he proved.

In the light of these considerations it is here maintained that the phrase "*legitime comprobatum*" characterizes the right of all the faithful to frequent a public oratory as a prerogative which the law itself has vindicated for them. The vindication which the law accords must of course rest on the assumption that the oratory is a public oratory. To establish proof that the assumption is warranted is a matter quite distinct from furnishing proof that as one of the faithful one may frequent the oratory when it is already acknowledged as a public oratory.

The essential postulate for the enjoyment of the right, namely that the oratory be a public oratory, is the very factor that seals for the faithful their right to frequent it. Only when that postulate can itself be called in question can there arise any doubt about the right of the faithful in this matter. That upon which the right of the faithful is conditioned may at times need to be established by way of proof, but the right of the faithful which rests thereon, never.

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PENALTY AFFECTING STOLE FEES

Does the act of exacting exorbitant stole fees, perquisites or honoraria become punishable through the penal law contained in canon 2408 solely in the event that a schedule of fees has been fixed by the bishops assembled in a provincial council or in a provincial meeting, and then has been accorded approval by the Sacred Congregation of the Council, or also in the event that an established laudable custom points to an exact amount in the fee that becomes receivable for a priest's specific ministrations?

TREPIDATUS

S.C.C., decr. 10 iun. 1896: I. An, et quae taxa imponi possit iuxta prudentiae et iustitiae regulas in materia sacramentali, ac speciatim in matrimoniali, itemque in materia beneficiaria?

II. An generalibus quibusdam editis normis, specifica praefinitio taxarum in singulis dioecesibus Ordinariorum arbitrio sit relinquenda; an potius praescribendum, ut hac de re agatur in synodis provincialibus, et quatenus synodi haberi nequeant, in conventibus Episcoporum in singulis provinciis et in Italia in singulis regionibus, ad hunc effectum peculiariter habendis, sub lege nempe, ut uniformis taxa in singulis provinciis seu regionibus quoad fieri possit statuatur, Sacrae Concilii Congregationi pro approbatione subiicienda?

III. An, et quaenam aliae provisiones hac de re sint adhibendae?

Ad. I. Affirmative, ita tamen ut quoad actus qui directe respiciunt sacramentorum administrationem servetur dispositio cap. 42 Decret. *de simonia*, scilicet ut libere conferantur ecclesiastica sacramenta et piae consuetudines observentur. Quod vero ad reliquos actus qui directe non respiciunt administrationem sacramentorum, uti sunt dispensatio a denunciationibus matrimoniorum, venia conferendi baptisma in privatis domibus, et cetera huiusmodi:

1. Servandas laudabiles consuetudines, et rationem prudenter habendam locorum, temporum ac personarum;

2. Vere pauperes eximendos a quibusvis expensis;

3. Taxas non adeo graves esse debere ut arceant fideles a receptione sacramentorum;

4. Quoad matrimonium in specie, remittendas ipsas taxas esse in casibus in quibus adsit periculum ne fideles in concubinatum proruant;

5. Tandem quoad beneficia ecclesiastica, taxas esse non debere proportionaliter inadaequatas reditibus beneficiorum.

Ad. II. Negative ad primam partem, affirmative ad secundam.

Ad. III. Affirmative, et taxarum descriptionem seu notulam modo et normis superius expositis confectam, quam primum transmittendam ad S. Concilii Congregationem pro approbatione; quae tamen concedenda erit ad instar experimenti, pro dioecesibus Europae ad quinquennium, pro reliquis vero ad decennium.—*Codicis Iuris Canonici Fontes*, VI (Typis Polyglottis Vaticanis, 1932), n. 4298.

S.C. Consist., 21 apr. 1910: Propositum fuit huic Sacrae Congregationi Consistoriali dubium: "Utrum post Const. *Sapienti consilio* adhuc spectet ad S.C. Concilii adprobare taxas Curiarum Episcopalium nec non dirimere quaestiones omnes quae ad eas referuntur; an vero haec facultas reservanda sit huic S.C. Consistoriali."

. . . Emi PP. respondendum censuerunt: "Affirmative ad primam partem, negative ad secundam."—*Codicis Iuris Canonici Fontes*, V (Typis Polyglottis Vaticanis, 1930), n. 2071.

Can. 463, § 1.—Ius est parocho ad praestationes quas ei tribuit *vel* probata consuetudo *vel* legitima taxatio ad normam can. 1507, § 1. (Italics added.)

§ 2.—Potiores exigens, ad restitutionem tenetur.

§ 3.—Licet paroeciale aliquod officium ab alio fuerit expletum, praestationes tamen parocho cedunt, nisi de contraria offerentium voluntate *certo* constet *circa summan quae taxam excedit.* (Italics added.)

§ 4.—Gratuitum ministerium ne deneget parochus iis qui solvendo pares non sunt.

Can. 1507, § 1.—Salvo praescripto can. 1056 et can. 1234, praefinire taxas pro variis actibus iurisdictionis voluntariae vel pro executione rescriptorum Sedis Apostolicae vel occasione ministrationis Sacramentorum vel Sacramentalium, in tota ecclesiastica provincia solvendas, est Concilii provincialis aut conventus Episcoporum provinciae; sed nulla vi praefinitio eiusmodi pollet, nisi prius a Sede Apostolica approbata fuerit.

§ 2.—Ad taxas pro actibus iudicialibus quod spectat, servetur praescriptum can. 1909.

Can. 1909, § 1.—Concilii provincialis, vel conventus Episcoporum est taxarum notulam ac regulam statuere in qua praefiniatur quid partes debeant pro expensis iudicialibus; quae sit retributio pro advocatorum et procuratorum opera a partibus solvenda; quae mercedis mensura pro versionibus et transcriptionibus; pro his examinandis et fide facienda de earum fidelitate; itemque pro exscribendis ex archivo documentis.

Can. 2408.—Taxas consuetas et legitime approbatas ad normam can. 1507, augentes aut ultra eas aliquid exigentes, gravi mulcta pecuniaria coerceantur, et recidivi ab officio suspendantur vel removeantur pro culpae gravitate, praeter obligationem restituendi quod iniuste perceperint.

S.C.C., *Dioecesis M. et Aliarum,* Taxarum Curiae, 11 dec. 1920: *Mens est:* "Che, escluso il doppio tassario, in una prossima conferenza si faccia una tassa unica, tenendo contro, oltre che della Bolla Innocenziana, delle prescrizioni del *Codice* e del decreto di questa Sacra Congregazione, 10 giugno 1896; e che nell' imposizione delle tasse si osservi una certa discrezione."—*AAS,* XIII (1921), 350-352.[1]

The commentators of canon 2408 have by and large done little more than reproduce the wording of the canon itself. Ayrinhac, for instance, wrote: "Once this [the determining of the amount of the payable fee] has been done, anyone demanding fees in addition or in excess of those which are approved should be punished with heavy

[1] The Bull *Essendosi avuto* was issued by Pope Innocent XI on October 8, 1678, to the bishops of Italy and the adjacent islands. The text of it may be seen in Ferraris, *Prompta Bibliotheca* (9 vols., Romae, 1885-1899), s.v. *Taxa.*

pecuniary fines.[2] Eichmann stated: " Gebühren dürfen nur in dem gesetzlichen Ausmasse (Taxordnung) erhoben werden."[3] And Coronata commented: " Ultra taxas legitime statutas aliquid exigere turpe lucrum sapit atque iniustitiam per abusum potestatis."[4] The statement of these authors evidently abstracted from the question of established laudable custom, which likewise could regulate the amount of the fee that could lawfully be asked for.

De Meester and Vidal, however, offered a more specific explanation. De Meester stated: " Provincialis taxarum praefinitio debet esse *uniformis, unica et moderata;* est ad normam citati canonis [1507, § 1] in singulis provinciis introducenda. Attamen, ubi propter adiunctas praefiniri nequeat, servari possunt laudabiles locorum consuetudines, praesertim quoad taxas occasione administrationis Sacramentorum et Sacramentalium perceptas."[5] And Vidal explained: " Codex praecipit ut taxae solvendae . . . ubi praefinitio per legem nondum facta sit saltem ex probata consuetudine determinatae esse debent. Fideles obligantur ad eas solvendas in definita certa quantitate (can. 2349), non ultra."[6] The statement of these two authors could readily imply that in the matter under question here they regard the violation of established laudable custom as likewise punishable through the penal law of canon 2408.

Canon 2408 mentions the " *taxae consuetae et legitime approbatae ad normam can. 1507.*" Is this phrase to be understood as pointing both to customary fees regarding which the provincial law has not yet lent any positive approval and also to fees regarding which, whether or not any laudable custom previously existed, the provincial law has made a specific disposition?

One can imagine four possibilities in actual practice: 1) That which reflects neither an existing laudable custom nor any specification by provincial law: 2) that which reflects solely an extant laudable custom apart from any positive approval whatsoever on the part of provincial law: 3) that which reflects the existence of a provincial

[2] *Penal Legislation* (New York: Benziger Bros., 1930), pp. 371-372.

[3] *Lehrbuch des Kirchenrechts* (2. ed., Paderborn: Schöningh, 1926), p. 755.

[4] *Institutiones Iuris Canonici,* IV (Taurini: Marietti, 1935), p. 659, n. 2228.

[5] *Juris Canonici et Juris Canonico-civilis Compendium,* Tom. III, Pars I (Brugis; Desclée de Brouwer, 1926), p. 382, n. 1455.

[6] *Ius Canonicum,* VII (Romae; Apud Aedes Universitatis Gregorianae, 1937), p. 604, n. 534.

law which was introduced, not by way of approving any extant laudable custom, but simply by way of a new regulation, and 4) that which reflects a provincial law that simply gave approval to an already extant laudable custom.

The first of these possibilities seems definitely to fall outside the purview of canon 2408, so that anyone who would demand a fee when custom does not warrant the making of any demand whatsoever cannot be regarded as liable for the specific *ferendae sententiae* punishments enacted in canon 2408. That follows from the ruling of canon 2228, according to which a penalty set up in the law is not incurred unless the delict has in its character been entirely that which the law precisely designates.

Likewise, it cannot be argued that the greater reprehensibleness which attaches to the act by which one makes a demand when none may be made at all calls for punishment at least the equal of that which canon 2408 has enacted, for canon 2219, § 3, disallows all such analogous appropriation and application of penalties. Whatever possible punishment may apply in such a case would have to derive its warrant through canon 2222, § 1, which authorizes the legitimate and competent ecclesiastical superior to impose a just punishment in view either of the emergence of scandal or of the particular gravity of the transgression.

It is with reference to the remaining listed possibilities that one must seek to establish the purview of canon 2408. No one will quarrel over the claim that the phrase "*taxae consuetae et legitime approbatae*" certainly contemplates the possible case listed under 4) above. But the same full measure of certainty in interpretation does not exist with reference to the possible contingencies mentioned under 2) and 3), especially when one simply looks to the structure of the phrase in question. Nevertheless there is still the prospect of reaching the needed certainty in interpretation if one can appeal to some parallel passage in which elsewhere in the Code the meaning of the law is plain and manifest. Such a passage seems furnished in canon 463, § 1, according to which a pastor is acknowledged as enjoying the right to such contributions which yield to him *either* in view of an existing approved custom *or* in consequence of a schedule of fees as fixed by provincial law. That which is his right the pastor can also rightfully demand. Now, if he becomes liable for punishment if he exceeds the demand which is warranted by specific provincial law, then should he not likewise be considered by the

legislator as liable for punishment when he exceeds the demand which is warranted by an extant approved provincial custom?

This argument does not trespass upon the principle which canon 2219, § 3, upholds. The wording of canon 2408 is sufficiently obscure in its import that for a clear understanding of it one must appeal to some parallel passage to gain certainty regarding its import. The wording of the canon is indeed such that it can quite logically be understood as referring to fees as determined by custom as well as to fees determined by positive provincial law. And if it be so understood, then its harmony with canon 463, § 1, becomes all the more intelligible, for a divergent sense could well be regarded as straining the evident harmony in law which, as it must be assumed, every legislator desires to achieve. Accordingly the penalty enacted in canon 2408 seems definitely applicable when anyone has exceeded the demand which is warranted in the light of an extant approved custom.

If, then, canon 2408 contemplates the same punishment whether one has made an exorbitant demand either in violation of the extant approved custom or in violation of such a custom as approved and confirmed by provincial statute, does the canon also contemplate the contingency in which one has made an unrightful demand in violation of the schedule as fixed by provincial statute, even if the statute had been introduced as an entirely new regulation, that is, in the absence of a previously extant laudable or approved custom? It appears certain to the writer that the canon relates also to this contingency. For the word *praefinire* in canon 1507, § 1, can point to the invoking of a new law which has no background in custom just as well as it can imply the enacting of a law which approves and confirms whatever custom already existed. Canon 1909 seems to confirm this view, for in it the law states that it belongs to the provincial council or to the meeting of the bishops of the province to set up (*statuere*) a schedule or regulation of fees for determining what the parties in a trial owe for judicial expenses, etc. And surely the word *statuere* has nothing about it that connotes simply the granting of an approval for what existed by way of prevailing custom.

It seems indicated, then, to conclude that canon 2408 does not touch the case in which anyone makes a demand for fees when no existing custom justifies the demand for any fees at all. But it appears warranted on the other hand to regard canon 2408 as covering

the contingencies listed above under 2), 3) and 4). In other words, the *ferendae sententiae* penalties enacted in canon 2408 will have application not only when a provincial council or episcopal meeting has approved whatever schedule of fees obtained previously by way of custom, and not only when it has set up a completely new schedule of fees—the subsequent approval of the Sacred Congregation of the Council having been given in both cases—but also when a standing approved custom or laudably sustained practice has specified the fees that may rightly be asked for.

Thus it appears that the phrase, "*taxae consuetae et legitime approbatae ad normam can. 1507,*" is to be read and understood with the conjunction *et* serving to introduce a second distinct member in the enumeration, and not simply enlarging a single and unified concept with some additional qualification. The scope of the penal law enacted in canon 2408 seems necessarily to extend to the point here indicated, for thus it seems best in harmony with the parallel passage which occurs in canon 463, § 1.

CLEMENT BASTNAGEL

THE CATHOLIC UNIVERSITY OF AMERICA

GOVERNMENT PENDING ADMISSION OF POSTULATION

Our community has postulated one of our members ineligible for office because she has already served two terms of six years as superioress. Since she cannot presume to act as superioress until the postulation is admitted by the Sacred Congregation of Religious, the question arises as to the person in whom the government of the community rests pending the decision of the Holy See.

CENTRIPETENS

Constitutions generally provide that the Mother Assistant shall take the place of the superioress when it is impossible for her to act. This provision is so evidently demanded by the necessities of the case that it would be surprising to find that some such rule was not inserted in the constitutions of the community involved in the case as presented herewith. A rule of this kind would give an indication as to the manner in which the proper government of the institute should be assured during the interval described. Moreover, a private response of the Sacred Congregation solved the problem in a special case in just this fashion, stating that until a

reply had been received from the Holy See, the government of the community would be in the hands of the first Councilor.

SUNDAY CONFESSIONS

What seems to be a very undesirable situation exists in several parishes of this diocese. Confessions are heard during the various Sunday morning Masses and what was begun as a privilege for the laity has grown into what seems to be a grave abuse. Very few of the laity are any longer going to confession during the hours assigned on Saturdays and on the vigils of the holy days of obligation. Opportunities are provided for confession during and before the week day Masses as well as on Saturday afternoon and evening. Many of the people now enter church on Sunday, immediately stand in line and walk directly from the confessional to the communion rail.

POPULATUS

The extent to which diocesan authorities can take action in prohibiting confessions on Sunday mornings must be determined on the general moral principles as laid down by moral theologians, as well as by the commentary offered by canonists on the implications of canon 892, § 1.[1]

According to this canon when the faithful *reasonably* seek to go to confession, those who are entrusted with the responsibility for their spiritual welfare are obliged to afford them the opportunity sought and this obligation is a grave one.

The question which is at the heart of the present problem is this, Do the faithful reasonably seek to go to confession when they disregard the opportunities afforded them during and before Mass on weekdays and on Saturdays and the vigils of holy days in the afternoon and evening? As to the faithful in general, the answer seems to be warranted that they are not reasonably seeking the opportunity in question.

On the other hand, there is always the probability that one or other penitent found it morally impossible to avail himself of the opportunities provided, at least after he fell into mortal sin. There is nothing sacrosanct about Sunday morning as such that would cause his request to be unreasonable because made at that time.

[1] Can. 892, § 1. Parochi aliique quibus cura animarum vi muneris est demandata, gravi iustitiae obligatione tenentur audiendi sive per se sive per alium confessiones fidelium sibi commissorum, quoties ii audiri rationabiliter petant.

On the other hand, there is no urgent reason that would demand the hearing of even such a penitent's confession during Mass. Further, the hearing of confessions during Mass when so many penitents are involved as in the statement of the present case can easily interfere with the reverential attitude which the congregation should preserve during the celebration of the Holy Sacrifice. The local Ordinary seems authorized to render a discreet judgment in reference to the situation and to take what steps may be deemed by him necessary to remedy the abuse.

It lies within his province, therefore, to determine whether he should be content with giving a quiet admonition to the priests of the diocese advising them to notify the people as if on their own responsibility that confessions will not be heard during Mass on Sundays and holy days; or whether the situation requires that a letter of his be read by the pastors communicating to the faithful the same limitation of opportunity.

It seems not desirable to prohibit the hearing of confessions on Sunday mornings. Such a restriction might easily deny the opportunity of confession to one who was seeking it reasonably. A general prohibition affecting the entire morning could place a priest in a position in which he would be constrained to turn away someone who actually approached him and asked that his confession be heard. Under the less extensive prohibition, the priest, in such a case, would need only tell the petitioner to wait until after Mass has been celebrated.

JEROME D. HANNAN

THE CATHOLIC UNIVERSITY OF AMERICA

Decrees and Decisions

CANONICAL

Romae, die 18 novembris 1948.

SACRA CONGREGATIO [1]
DE SACRAMENTIS
N. 5869/48.

BEATISSIME PATER,

Archiepiscopi et Episcopi Statuum Foederatorum Americae Septentrionalis, ad pedes S.V. provoluti, humiliter postulant derogationem Decreto " Spiritus Sancti munera " die 14 septembris a. 1946 a S. Congregatione de Sacramentis edito, ita ut in domibus sic nuncupatis maternitatis vel nosocomiis pro mulieribus parturientibus vel brephotropheis suarum dioecesium, Confirmationis sacramentum valide et licite conferre valeat puerulis ibi receptis, qui in adiunctis ab eodem Decreto recensitis reperiantur, Cappellanus earumdem domorum.

Petitionis ratio est difficultas maxima pro parocho loci, aliis ministerii sui gravato muneribus, Confirmationem fere passim conferendi, attento praesertim magno infantium infirmorum numero in enunciatis domibus commorantium.

EX AUDIENTIA SS.mi diei 25 octobris 1948.

Sanctissimus Dominus Noster Divina Providentia Pius Papa XII, referente infrascripto huius S. Congregationis Pro-Praefecto, relatis precibus benigne annuere dignatus est, ea tamen lege ut Confirmationis sacramentum, in adiunctis de quibus in praefato Decreto, personaliter conferatur puerulis a Cappellano domibus de quibus in precibus *stabiliter* addicto, et si plures in una domo constituti sint Cappellani, ab eorumdem primo, ceteris prorsus exclusis.

Cappellano autem hac facultate uti licebit tantum si Episcopus dioecesanus haberi nequeat, aut legitime impediatur quominus per se ipse Confirmationem conferat; nec alius praesto sit Episcopus,

[1] Published herewith with the permission of His Excellency, the Most Reverend Apostolic Delegate.

communione gaudens cum Sede Apostolica, licet titularis tantum, qui sine gravi incommodo ipsi suffici queat. Itidemque si parochus loci, in iisdem adiunctis, haberi et ipse nequeat, vel legitime impediatur quominus sacramentum istud conferat. In absentia autem Cappellani, aut in eius impossibilitate per se ipsum confirmandi, nullus alius, praeter Episcopum vel loci parochum, idem sacramentum valide conferre valet. Servatis, in reliquis, terminis et clausulis memorati Decreti. Contrariis quibuslibet minime obstantibus.

Praesentibus valituris *ad annum*, a data huius rescripti computandum.

✠ B. Card. Aloisi-Masella, *Pro-Praefectus*

L. S.

F. Bracci, *Sec.*

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SACRA CONGREGATIO DE SACRAMENTIS [1]

BEATISSIME PATER,

Ordinarius Cincinnaten., ad pedes Sanctitatis Vestrae humiliter provolutus, postulat, facultatem permittendi Sacri iterationem ferialibus diebus infra hebdomadam, occasione matrimoniorum vel funerum vel ad renovandas Sacras Species in oratoriis monasteriorum, attenta Sacerdotum penuria.

Die 16 Novembris 1948, Sacra Congregatio de disciplina Sacramentorum, vigore specialium facultatum Card. Praefecto a SS.mo D.no Nostro Pio Papa XII tributarum, attentis expositis, Ordinario Oratori, gratiam indulget juxta preces, dummodo nullus alius Sacerdos liber praesto sit pro celebratione alterius Missae, vetita celebranti pro secunda Missa, eleemosinae perceptione. Praesentibus valituris *ad triennium*, in casibus verae necessitatis.

✠ B. Card. Aloisi Masella, *Pro-Praefectus*

L. S.

F. Bracci, *s.*

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Permission for Bination on Passion Sunday

In an Apostolic exhortation to the universal hierarchy of our Holy Father authorized all priests to offer two Masses on Passion Sunday,

[1] This particular indult is reported here verbatim because of its inherent interest for readers of The Jurist.

April 3, and urged all the faithful to receive Holy Communion on that Sunday. The Sacred Congregation of Rites directed that the first of the two Masses celebrated in accordance with this permission should be the Mass of the Sunday with a commemoration for the Roman Pontiff in honor of the fiftieth anniversary of his ordination to the priesthood and that the second Mass should be the votive Mass for the remission of sins with no commemoration, not even of the Sunday, but with the recitation of the Creed and the Preface of the Passion.

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Limitation of Faculties Relating to Fast and Abstinence

Under a decree effective March 2, 1949, and binding on the hierarchy of the Latin rite, the faculties granted bishops by the Apostolic indult of December 19, 1941 relating to dispensations from the law of fast and abstinence were restricted. Under the new decree there can be no dispensation from the Friday abstinence or from the fast required on the vigils of the Feast of the Assumption and of Christmas. Under the previous faculties the restriction extended to Ash Wednesday and Good Friday and this restriction is effective also under the new decree. A similar decree has been published for the Oriental rite.

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The Pope's Ash Wednesday Radio Appeal

On March 2 our Holy Father addressed a radio message to students in Catholic schools of the United States urging them to contribute their mite as a specific Lenten sacrifice to help feed and clothe suffering children in war-stricken lands. Contributions made in response to this appeal go to the general relief fund which the Bishops' Emergency Relief Committee of the National Catholic Welfare Conference is raising.

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The Pope's Advocacy of Generous Immigration Laws

A letter received from the Roman Pontiff by Most Rev. John T. McNicholas, O.P., S.T.M., Archbishop of Cincinnati, praised the work of the hierarchy and of the faithful in behalf of the admission of displaced persons into the United States, but urged continued effort in the direction of unimpeded immigration privileges.

Beatification and Canonization Causes

The Sacred Congregation of Rites has issued decrees approving the exercise of heroic virtue on the part of Giuliano Amunoir, a Jesuit, and Rosa Venerini. Another decree has approved the miracles required for the beautification of Anna Marie Javonhey, Foundress of the Sisters of St. Joseph of Cluny. The Sacred Congregation has also issued decrees asserting that it is safe to proceed to the canonization of Blessed Joan of Valois, once Queen of France, of Blessed Bartolomea Capitanio, and of Blessed Giuseppe Rossello.

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International Regime in Palestine

In his Christmas message, our Holy Father approved the establishment of an international regime over the Holy Land.

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New Dioceses in the Western Hemisphere

Six new sees were established by the Holy See during 1948, four of them in the Western Hemisphere. The sees are: Joliet, Illinois; St. Paul, Alberta, Canada; Caruaru, Brazil; Ambato, Ecuador; San Fernando, Philippine Islands; and Karachi, India. Marseilles and Golbourn (the latter in Australia) were made archdioceses and the Apostolic Prefecture of Lishui (China) was made a diocese.

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Third Synod of Sioux Falls

The third Synod of Sioux Falls opened January 27 in St. Joseph's Cathedral. The previous synods were held in 1892 and 1893.

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Joint Canadian Pastoral

All seventy-two members of the Canadian Hierarchy joined in issuing a Pastoral Letter commemorative of the fiftieth anniversary of our Holy Father's ordination, April 2.

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General Mission in England

A joint pastoral of the English Hierarchy provided for a general mission and asked for the observance of Friday as a day of fast and abstinence from the beginning of Lent until the end of the mission.

It also urged, during the same period, the weekly observance of the Holy Hour and the revival of family prayer, especially the Rosary.

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Austrian Canon Law Society

On February 1, the Austrian Canon Law Society was founded by representatives of all the Austrian dioceses, including lay canonists and lawyers, among them the President of the Austrian Supreme Court of Constitution, Dr. Ludwig Adamovich, a former rector of the University of Vienna. The first President of the Society is Dr. Rudolf Koestler and the first Vice President, Dr. Franz Arnold. The members of the board of directors include Dr. Hefel, former Undersecretary of State in the Ministry of Education; Dr. Trummer, Professor in the School of Theology of the University of Graz; Dr. Holboeck, Professor of Canon Law in the School of Theology of the University of Salzburg; Dr. Mitter, a lawyer; and Dr. Ploechl, former Visiting Professor in the Faculty of Canon Law of The Catholic University of America. It is through the courtesy of Dr. Ploechl that this information has been made available to The Jurist.

SECULAR

Crusade in New Mexico

A court decision issued in the case of the schools of New Mexico barred one hundred and forty-three Catholic brothers and sisters from teaching in the public school system, though it did not rule against the wearing of the religious garb and therefore did not bar brothers and sisters as such from enjoying these posts. The ruling was imposed on the specific personnel involved on the theory that it had violated the law of the State, even though in its actions it was acting under opinions given by the highest legal authority in the State, i.e., in giving religious instruction before and after regular school hours.

Among the violations of either the Federal Constitution or the Constitution of New Mexico, the court cited the following activities: the use of buildings containing sectarian emblems for tax-supported school classes; the use of buildings owned by the Catholic Church

for such classes, when not entirely under State control or when partially devoted to parochial school purposes; the teaching of sectarian doctrines in public schools [before and after school hours]; the furnishing of free textbooks to Catholic parochial and private schools; the furnishing of free transportation to pupils of parochial schools; the adoption of a multiple rather than a uniform list of approved textbooks for use in the public and the private schools; and the furnishing of so-called sectarian textbooks to tax-supported or to private schools.

Thirty-one schools in eleven counties were involved; three schools in which sisters taught were not included, only one of which is in operation.

The ruling will require the school districts effected to build their own schools and to attempt to obtain either lay teachers or members of religious communities who have not been involved in the prohibition imposed by the court.

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Hungarian Histrionics

His Eminence, Josef Cardinal Mindszenty, Archbishop of Gran and Primate of Hungary, was arrested by the sovereign State of Hungary on December 26 and brought to trial on February 3 charged with treason, attempts to overthrow the government and violation of foreign exchange regulations. After a three-day trial His Eminence was sentenced to life imprisonment. The Sacred Consistorial Congregation issued a decree both at the time of the arrest and at the time of the trial pointing to the excommunication of all persons involved.

In behalf of the Hierarchy of the United States, Most Rev. John T. McNicholas, O.P., S.T.M., sent messages of protest to His Holiness, to the President of the United States, to Undersecretary of State, Robert A. Lovett, and to the Hungarian Minister to the United States, Andrew Sik. Through his efforts as Chairman of the Administrative Board of the National Catholic Welfare Conference, Sunday, February 6, was observed throughout the United States as a day of prayer for the Cardinal and of protest against his imprisonment. On that day, His Eminence, Francis Cardinal Spellman, delivered a telling sermon from the pulpit of St. Patrick's Cathedral, New York City.

Demonstrations of protest occurred where on March 6 in Rome our Holy Father addressed an assembled throng of three hundred thousand; in New York City where ten thousand Knights of Columbus paraded along Fifth Avenue to St. Patrick's Cathedral, where they assisted at Mass for their deceased brethren and pledged loyalty to His Eminence, Francis Cardinal Spellman, in his fight against Communism; and in San Diego, California, where ten thousand Catholics, Jews and Protestants assembled in a mass demonstration which proposed a trade boycott of Hungary and the cessation of financial aid to that country.

After the arrest of the Cardinal, the Hungarian authorities asked the Vatican for an understanding. The Vatican refused to negotiate while the Cardinal was in prison. Vatican officials said that in addition to his release, an indispenable premise to any negotiations would be a guarantee that lay authorities would respect the right to freedom of religion and education, including the right to teach religion in the schools.

Thomas J. Fox, former National Catholic Welfare Conference War Relief Services official in Hungary, who was charged by the Hungarian authorities with being the intermediary between His Eminence, Josef Cardinal Mindszenty and His Eminence, Francis Cardinal Spellman, emphasized his denial of the charges by returning to the Hungarian Embassy in Washington the Cross of the Hungarian Republic given him in 1947 for his work in the distribution of the relief supplies of the National Catholic Welfare Conference's War Relief Services.

A significant alibi available to His Eminence, Joseph Cardinal Mindszenty, lends pointed confirmation to his defense. At the time that he was charged with negotiating with Crown Prince Otto in a monastery near Chicago (June 21, 1947), he was actually in Ottawa (June 17-23, 1947), taking part in the various ceremonies of the Marian Congress celebrated there at that time.

The government of Hungary has been required by the protests of the people to retain religious instruction in the schools. Because of this it has been obliged to reëstablish State salaries for pastors for a period of six months at a rate fifteen percent less than the former one. The religious who formerly operated the schools are largely without means of sustenance.

The Hungarian government has been unable to cooperate with CARE in arriving at a satisfactory agreement for the distribution of its parcels and for that reason CARE has ceased delivery of these parcels in Hungary. Refunds will be made for undelivered orders.

The Hungarian government, because of its request that the United States recall its representative, has been refused permission to send representatives to the so-called " Peace Meeting ", though the State Department has reluctantly agreed to the admission of twenty-two representatives of other countries behind the Iron Curtain. This so-called scientific and cultural conference to promote World Peace opened in the Waldorf-Astoria, New York, March 25th, under the auspices of the National Council of Arts, Sciences and Professions.

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Presidential Inauguration

At the inauguration of the President on January 26, Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington, delivered the Benediction. In taking the oath of office the President touched a facsimile of the Gutenberg Latin Vulgate Bible as well as a Protestant Bible.

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Federal Aid to Education

The American Federation of Labor criticized the Thomas Federal Aid to Education Bill because it does not specifically earmark funds to raise the salaries of teachers and does not guarantee health and welfare services for children in non-public as well as in public schools. It insisted that seventy-five per cent of the amount allocated should be devoted to an increase in the salaries of teachers and suggested that the total sum allocated should be a billion dollars instead of three hundred million.

Senator Brien McMahon's bill provided for an allocation of three hundred and a quarter million with the quarter million earmarked for health and welfare services to be given children in all schools but as an integral part of the total sum.

The United States Senate Committee on Education and Labor has decided to divide the subject matter of the legislation into two separate bills: one in the form of the Taft bill passed by the Senate last year and another providing for health and welfare aid to children in parochial schools as well as in public schools. The former bill

would allocate three hundred million dollars the distribution of which would be turned over to the States which would thus enjoy the right to determine whether to make non-public schools beneficiaries of the Federal bounty. A sub-committee has been appointed to draw up the bill for the allocation of the quarter million or more to be dedicated to health and welfare services.

At the thirty-fifth annual meeting of the Association of American Colleges it was suggested that the Federal government should aid education through the institution of a half million scholarships worth from five hundred to a thousand dollars, leaving the students free to choose the colleges in which they would enjoy the benefits of the scholarships.

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Suggested Amendment of the Displaced Persons Law

The National Catholic Resettlement Council has recommended that under an amendment to the Displaced Persons Law, immigration should be authorized in proportion to the racial and religious groups represented in Displaced Persons Camps, i.e., fifty-five per cent Catholics, twenty-seven per cent Protestants, and eighteen per cent Jews.

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Resistance to Roman Catholic Aggression in the United States

The first public meeting of Protestants and Other Americans United for the Separation of Church and State was called in Washington, D.C., to raise a million dollars to cope with the aggressive program of the Roman Catholic Church. Speakers alleged that the President of the United States was elected largely as the result of an appeal to the Roman Catholic Hierarchy; they insisted that the world contest is not between democracy and Communism but between the Vatican and Communism, censuring the President's inaugural address which proposed the contrary thesis; they accused the House Un-American Activities of doing the work of the Vatican in publishing booklets against Communism; and they declared unconstitutional an outlay of forty thousand dollars in aid of one Church for the purpose of maintaining a personal representative of the President at the Vatican.

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Released Time Programs

A measure that would have authorized released time for the religious instruction of children attending public schools in the State of Washington was killed in conference. In Indiana a bill that would have interfered with released time was defeated by the appointment of a committee to study it, since the sessions of the legislature will end before the study can be completed.

In protesting against opposition to released time on the part of certain Jewish authorities, David Goldstein cited figures released by the Jewish Telegraph Agency to the effect that Hebrew is taught in nineteen New York senior high schools, five junior high schools and two evening high schools. He argued that this practice unites the Synagogue with the State, since Hebrew is the cultural cement of the Jewish people promoting through Hebrew prayer their religious loyalties.

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Transportation

The House of the Montana Legislature, by a vote of 71-10, passed a bill which allows children attending parochial schools to ride public school busses, if the parents of the former pay a proportionate share of the operating costs.

A similar bill was killed by the School Committee of the House in Iowa.

The Indiana Senate defeated an attempt to obtain free transportation for persons attending a Protestant Sunday school.

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New York Bill Against Communist Teachers

A bill, approved by the Board of Education of New York City, has been introduced into the Assembly for the purpose of creating bars within the State against the employment of school teachers who are members of the Communist Party.

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Licensing of Comic Books in New York

By a vote of 49-6 the Senate of New York has passed a bill to set up a division in the State Department of Education for the purpose of licensing comic book publications.

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Cross on Public School Building

A ruling of the State Board of Education of New York holds that no religious symbol may appear on a public school building. Consequently it ordered a lighted cross, a holiday decoration, to be removed from a public school building in Floral Park.

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Kentucky Rental of Public School Buildings to Religious Groups

The Assistant Attorney General of Kentucky has stated that public school buildings may be rented to religious groups when regular classes are not in session.

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Kentucky Ruling Against State Appropriations to Hospitals

A Circuit Court in Kentucky has held that the State Constitution bars the use of State tax money to aid institutions which the State neither owns nor controls. The ruling was adverse to $190,000 allocated to three hospitals by the 1948 session of the Legislature.

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Birth Control Measure in Connecticut

An attempt is again in process in Connecticut to liberalize the anti-birth-control statute of that State. A bill similar to that passed by the House two years ago but defeated by the Senate has again been introduced into the House.

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Idaho State Board of Eugenics

The Senate of the State of Idaho has sent to the Governor a bill reactivating the State Board of Eugenics and appropriating eight thousand dollars for its work. It provides for the sterilization of mental defectives and sex perverts.

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Newfoundland Joins Canadian Confederation

March 31 was the effective date on which Newfoundland became the tenth province in the Canadian Confederation, following approval by the Parliament of Canada and the Government of Newfoundland and confirmation by the Parliament of the United Kingdom.

The Legislature of Newfoundland is to have exclusive authority to make laws relating to education but it is not permitted to pass laws prejudicially affecting any right or privilege with respect to denominational schools, which are to receive their share of public funds for education as provided at the time of the union as well as of any grant voted for institutions conducted under the authority of the Legislature.

The present Confederation operates under the British North American Act of 1867 which safeguarded the rights of denominational schools, while allowing the provinces to make laws affecting education not in conflict with those rights.

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Quebec Padlocks Home of Communist Organizer

The Premier of Quebec, Maurice Duplessis, insisted that there can be no compromise with Communism in applying the padlock law of the Province to the home of a reported Communist organizer in Montreal, four rooms of whose house had been sublet to Communist organizations. Truckloads of Communist literature were removed from them for examination by the police.

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Jehovah's Witnesses and Quebec Ordinance

In a case involving the violation of an ordinance of the City of Quebec which requires the written permission of the Chief of Police for the distribution of literature, Rev. Herve Gagne, Professor of Theology at Laval University, testified that from their own writings it is apparent that Jehovah's Witnesses do not consider their teachings a religion, that their group does not constitute a religious sect, and that their propagandists cannot be regarded as ministers of a religious cult. He said that they are only an association of students of the Bible who have a complete commercial organization for their purpose.

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Suppression of the Sinarquista Party

The Sinarquista Party, *Fuerza Popular*, has been outlawed by a decree of the Mexican Government on charges of undemocratic behavior and sedition.

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Tax Exemption of Funds of French Catholic Schools

The Poitiers Court of Appeals has ruled that the fund-raising activities of Catholic schools should be regarded as charitable enterprises and as exempt from taxation. His Eminence, Emile Cardinal Roques, Archbishop of Rennes, and other bishops testified in the trial of the priests indicted by the Finance Administration for failure to pay the tax.

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Suppression of Obscene Literature in France

The French National Assembly has adopted a decree to suppress obscene publications and other publications filled with the exploits of gangsters and crime stories. The enforcement of the decree is to be entrusted to commissions composed of representatives of the family, of the State, and of the body of educators, including teachers from private schools.

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French Bonds for Church Restoration

Bond buyers covered in a day the State-guaranteed loan of a billion and a quarter francs (about $4,300,000) for the reconstruction of French churches and religious monuments. Bond buyers were permitted to stipulate the denomination they desired to be favored by the sum represented in their purchase.

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Defense of Belgian State Aid to Schools

A joint pastoral of the Belgian Hierarchy defended Catholic schools against Socialist and Liberal attacks aimed at blocking State aid and at intensifying State control.

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French Demands on Israeli Government

When the French Government notified the Israeli Government of its *de facto* recognition, it requested that acknowledgment be made of the special rights always accorded French religious establishments in the Holy Land and claimed reimbursement for extensive damage caused by Jewish occupation forces. The Israeli authorities consented to the payment of the reparations for material damage and declared themselves ready to give religious and cultural institutions full freedom to exercise their functions, but they refused to allow

them special rights that were enjoyed in the past, since this was considered incompatible with the full sovereignty which the government should insist on exercising within its territory.

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Israeli Pact with Russia

On February 10, the Israeli Government made a pact with Russia which guarantees Russian support for newly Sovietized Russian Orthodox churches and monasteries of Palestine, Sovietized by the replacing of the anti-Communist Archimandrite Anthony with the Soviet Archbishop Leonidas of Moscow.

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Catholic Units on UNESCO

Despite negative votes cast by the Soviet bloc members, the Economic and Social Council of the United Nations has granted joint consultative status in category B to the International Movement of Catholic Students and the International Catholic Movement for Intellectual and Cultural Affairs.

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The Church in the Soviet Zone

Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo, and Apostolic Visitator to the American Zone of Germany, reports that according to his information, the Church in the Soviet Zone still enjoys freedom of worship, apart from youth activities and the work of Catholic Action groups. Bishops whose dioceses are partly in the Russian Zone have received permission to visit there and to administer Confirmation.

It is reported that a clerical seminary has been established at Allenstein in the Soviet Zone, but that most of the churches there remain requisitioned by Soviet troops for use as quarters and as store rooms.

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State Regulation in Constitution for West Germany

His Eminence, Joseph Cardinal Frings, Archbishop of Cologne, speaking as Chairman of the Fulda Conference, has protested to the German Parliamentary Council at Bonn against the new Constitution for West Germany, because it provides for State regulation of

Church affairs. At the same time, His Eminence insisted on the parental right of education.

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Joint Memorandum of Bishops of Czechoslovakia

The Bishops of Czechoslovakia addressed a joint memorandum to the government in Prague insisting that in spite of promises of religious liberty made by it, an attack has been launched on the Church and on religion along the same lines as those followed in other countries. They affirmed that they are determined to live with their faithful clergy as brothers in Christ, ready to make any sacrifice.

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Suppression of the Byzantine Rite in Romania

By a decree of December 1, the Romanian Government has suppressed all dioceses of the Byzantine Rite, as well as all chapters, all religious communities and all its other institutions. The property is confiscated by the State which allots the parish property to the Orthodox Church. The Byzantine bishops had addressed a letter to Peter Groza, President of the Romanian Council of Ministers, refusing to separate from Rome. They were all placed under arrest. The same fate was meted out to one hundred and twenty priests of that Rite in Cluj. The Latin Rite Church in Blaj was closed when Catholics of the Byzantine Rite flocked to it after their Cathedral had been handed over to the Greek Orthodox Church. The Romanian Orthodox Patriarch gave indisputable evidence of his loyalty to the regime by an attack on the Pope.

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Bulgarian Oppression

In introducing a bill in the Bulgarian Parliament for the recognition of the Bulgarian Orthodox Church as the only Peoples' Church, involving rigid State supervision of all other religious bodies, Foreign Minister Vassil Kolarov insisted that no official representative or delegation from the Vatican will be permitted to work in Bulgaria.

Fourteen of the fifteen Protestant clergymen placed on trial in Sofia confessed to espionage, treason and black market dealings; one admitted only violation of currency regulations.

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Hostility in Yugoslavia

The Catholic Press Agency, KIPA, reports that Tito's regime still incites the members of the Orthodox Church against Catholics, keeps Catholic schools closed, evicts nuns from orphanages and hospitals, and slanders and arrests priests on trumped-up charges.

Because Communist control in Yugoslavia has made it impossible for him to continue the exercise of his jurisdiction, Most Rev. Pietro Doimo Munzani, Archbishop of Zara, has been transferred from his see to become Titular Archbishop of Tiana.

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Charge of Russian Slave Labor

Assistant Secretary of State Willard C. Thorp, in a hearing before the United Nations, has asked for an international inquiry into Soviet labor camps where from eight to fourteen million persons are reported confined, according to affidavits taken by the American Federation of Labor from former inmates which it has submitted to the Economic and Social Council.

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Reorganization of Ecclesiastical Tribunals in Iraq

Iraq Law n. 32 arrogates to the government the right to reorganize ecclesiastical tribunals along Moslem lines and allows each religious community to have only one tribunal (formerly each of the seven Rites had its own tribunal).

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Communist Policy in China

Vatican officials are said to be in possession of secret papers of the Chinese Communist Central Executive Committee which order Red military leaders to wipe out Catholicism and all other religions in their path and to set up an atheistic State with formal tolerance but underground persecution in recently acquired sectors and with official assurances of religious freedom in territories in process of occupation.

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Chronicle

GENERAL

Our Holy Father radioed a message to Most Rev. John T. McNicholas, O.P., S.T.M., Chairman of the Administrative Board of the National Catholic Welfare Conference, urging generosity to the collection to be taken up on Laetare Sunday, March 27th, in an effort to gather five million dollars for the Bishops' Fund for the Victims of War.

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The Most Reverend Apostolic Delegate to the United States extended our Holy Father's cordial good wishes on the occasion of the Inauguration of President Harry S. Truman.

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The newly appointed Ambassador of Spain to the Holy See is Joaquin Ruiz-Giminez.

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Premier Alcide de Gasperi paid a State visit to our Holy Father on February 11 in commemoration of the twentieth anniversary of the signing of the Lateran Pact. He then placed a wreath on the tomb of Pope Pius XI.

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Clemente Cardinal Micara, Prefect of the Sacred Congregation of Rites, was Papal Legate to the Bolivarian Eucharistic Congress held January 26-30 at Cali, Colombia.

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Most Rev. Giovanni Dellepiane, Apostolic Delegate to the Belgian Congo and Ruando-Urundi has been named Papal Internuncio to Austria.

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Most Rev. Guglielmo Piani, S.C., recent Apostolic Delegate in the Philippines, has been appointed to a similar post in Mexico, the first to hold that position as a separate post since the mid '30's. It is not yet decided whether he shall be an Apostolic Delegate or an Apostolic Visitator.

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Most Rev. Egidio Vagnozzi has been appointed Titular Archbishop of Mira and Apostolic Delegate to the Philippines.

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His Eminence, Francis Cardinal Spellman headed a delegation from the United States to the Second Inter-American Week of Catholic Action held in Havana, February 7-13.

Most Rev. Richard J. Cushing, D.D., Archbishop of Boston, offered prayer at the inauguration of Gov. Paul A. Dever of Massachusetts.

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On January 16, Most Rev. John J. Wright, D.D., Auxiliary of Boston, preached the sermon at the annual Red Mass, celebrated in the Shrine of the Immaculate Conception, Washington, D. C., by Rev. Jerome D. Hannan, S.T.D., J.C.D., Associate Professor of Canon Law, The Catholic University of America.

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On March 12, in the presence of the Most Rev. Apostolic Delegate and of Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington, Most Rev. James L. Connolly, D.D., Coadjutor of Fall River, preached the sermon at the Solemn Mass celebrated by Rt. Rev. Msgr. Antonio Samore, Counselor of the Apostolic Delegation, in the Shrine of the Immaculate Conception, commemorating the tenth anniversary of the Coronation of Pope Pius XII.

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The 17th National Catholic Conference on Family Life, held March 7-9 in San Francisco, was opened with a Pontifical Mass celebrated by Most Rev. Hugh A. Donohoe, D.D., Auxiliary of San Francisco, whose mother was given, during the Conference, an award by the National Catholic Welfare Conference Family Life Bureau. The sermon at the Mass was preached by Most Rev. John J. Mitty, D.D., Archbishop of San Francisco. Addresses were made during the Conference by Most Rev. Peter W. Bartholome, D.D., Coadjutor of St. Cloud, and Most Rev. James T. O'Dowd, D.D., Auxiliary of San Francisco. The sermon at the Holy Hour which closed the Conference was preached by Most Rev. Timothy Manning, D.D., Auxiliary of Los Angeles.

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The 10th annual convention of the American Catholic Sociological Society was held in Chicago at Loyola University, December 27-29. Rt. Rev. Msgr. Robert Navin was elected President.

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On December 27 Most Rev. Edward F. Hoban, D.D., celebrated Pontifical Mass in St. John's Cathedral, Cleveland, to open the 6th annual meeting of the Catholic Economic Association. Rev. Leo C. Brown, S.J., was elected President.

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December 26-29, the National Federation of Catholic College Students and the Newman Club Federation met in Chicago.

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April 1, 2, the annual conference on Eastern Rites and Liturgies will be held at Fordham University. The theme of the conference will be the difficulties of the day in the Holy Land.

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January 22 marked the opening of ceremonies held in observance of the golden jubilee of St. Elizabeth's College, Convent Station, the first college for

women in New Jersey. A Pontifical Mass was celebrated by Most Rev. Thomas A. Boland, D.D., Bishop of Paterson. Most Rev. Thomas A. Walsh, D.D., Archbishop of Newark, assisted in the sanctuary.

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February 25 marked the second centenary of the papal approval of the constitutions of the Redemptorists by Pope Benedict XIV, seventeen years after the founding of the Congregation.

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Most Rev. Thomas J. Walsh, D.D., Archbishop of Newark, has observed his seventy-fifth birthday anniversary.

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Rev. John J. Wynne, S.J., died November 30.

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Very Rev. James M. Voste, O.P., for the past ten years Secretary of the Pontifical Commission for the Study of the Bible and a member of the Commission since 1929, died at the age of 66. Requiem Mass at his funeral was celebrated by Most Rev. Manuel Suarez, O.P., Master General of the Dominicans, in the Church of Santa Maria Sopra Minerva.

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DIGNITIES

March 7 was the date on which three bishops were consecrated in Holy Name Cathedral by His Eminence, Samuel Cardinal Stritch. They are Most Rev. Martin D. McNamara, D.D., first Bishop of Joliet; Most Rev. William A. O'Connor, D.D., Bishop of Springfield; and Most Rev. William E. Cousins, D.D., Auxiliary of Chicago. The co-consecrating bishops were Most Rev. John J. Boylan, D.D., Bishop of Rockford, and Most Rev. Albert R. Zuroweste, D.D., Bishop of Belleville. The sermon was preached by Most Rev. Joseph H. Schlarmann, D.D., Bishop of Peoria.

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On March 15 Most Rev. Robert E. Lucey, D.D., Archbishop of San Antonio, installed in the Diocese of Corpus Christi Most Rev. Mariano S. Garriga, D.D., Coadjutor of that Diocese since 1936. The sermon was preached by Most Rev. Eugene J. McGuinness, D.D., Bishop of Oklahoma City-Tulsa. Most Rev. Emmanuel B. Ledvina, D.D., the former bishop, retired because of age and ill health.

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Most Rev. Joseph F. Rummel, D.D., Archbishop of New Orleans, has been named Assistant at the Pontifical Throne.

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Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, has been made Assistant at the Pontifical Throne.

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Most Rev. Carlo Agostini, D.D., Bishop of Padua, has been made Patriarch of Venice, succeeding His Eminence, Adeodato Giovanni Cardinal Piazza, Secretary of the Sacred Consistorial Congregation.

Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington, has been named by the Inter-American Catholic Social Action Confederation formed at Rio de Janeiro last August to be its President-Counselor. The Confederation has established its Secretariat at Washington.

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On March 14, the Ambassador of France, in the name of his government, conferred the rank of officer of the Legion of Honor on Most Rev. Patrick A. O'Boyle, D.D., Archbishop of Washington, and the rank of chevalier of the Legion on Rt. Rev. Msgr. Howard J. Carroll, D.D., Executive Secretary of the National Catholic Welfare Conference.

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Most Rev. Romeo Gagnon, D.D., has been named Bishop of Edmunston, New Brunswick.

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On February 2 Most Rev. Stefan Wyszynski, D.D., Bishop of Lublin, was installed as Archbishop of Gniezno and Warsaw and Primate of Poland, succeeding His Eminence, August Cardinal Hlond.

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On January 30 Most Rev. John K. Mussio, D.D., Bishop of Steubenville, received the honorary degree of Doctor of Laws from the University of Notre Dame.

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On March 21, Most Rev. John F. Dearden, D.D., Coadjutor of Pittsburgh, received the honorary degree of Doctor of Laws from St. Vincent's College, Latrobe, Pa.

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Rt. Rev. Msgr. William J. Teurlings, of the Diocese of Lafayette, has been named a Protonotary Apostolic.

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The following have been named Domestic Prelates: Rt. Rev. Msgrs. John J. Moylan, Francis Szubinski, Joseph M. Congedo, Joseph B. Scully, Arthur J. Avard, George A. Kreidel, Joseph M. Egan, Bonaventure A. Filitti, John D. McGowan, Edward Roberts Moore, John C. Mulcahy, William R. Kelly, George C. Ehardt, Michael P. O'Shea, John J. Scally, John S. Middleton, Francis J. Murphy, John J. Corrigan, Edward J. Waterson, Walter P. Kellenberg, John J. Maguire and Christopher J. Weldon, of the Archdiocese of New York; William E. Kelly, Henry P. Graebenstein and Francis J. Loughran, of the Archdiocese of Washington; Edward J. Creager, Francis A. Gressle, Charles W. Kuenle, James F. McNary and Anthony Moeller, of the Archdiocese of Cincinnati; Tiburtius A. Goebel, Thomas A. Nolan, Frederick Burkhart and Anthony Schlernitzauer, of the Diocese of Columbus; E. Lerschen, Arthur Francis Garneau, Albert J. Bacque, Paul M. Fusilier, Clay Bienvenu, Olin Broussard and Avegno L. Soulier, of the Diocese of Lafayette; and J. J. O'Neill, of the Diocese of Sioux Falls.

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The following have been named Papal Chamberlains: Very Rev. Msgrs. John J. Curry and John J. Voight, of the Archdiocese of New York; James E. Cowhig and John S. Spence, of the Archdiocese of Washington; Henry J. Vogelpohl, of the Archdiocese of Cincinnati; Joseph A. Cousins, George Mason and Roland Winel, of the Diocese of Columbus; Henry J. Grigsby and Joseph Kiefer, of the Diocese of Steubenville; and Gilbert Schmenk, Vice Rector of the Pontifical College Josephinum.

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Very Rev. Patrick T. Brennan has been made Prefect Apostolic of Kwangju, Korea.

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On January 18 Most Rev. Emmet M. Walsh, D.D., Bishop of Charleston, blessed Rt. Rev. Robert McGann, O.C.S.O., as Abbot of the Abbey of Our Lady of the Holy Ghost, Conyers, Georgia.

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On January 22, Most Rev. Leo J. Steck, D.D., Auxiliary of Salt Lake City, blessed Rt. Rev. Maurice Lans, O.C.S.O., as Abbot of the Abbey of Our Lady of the Most Holy Trinity, Huntsville, Utah.

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Rev. Edward Wuenschel, C.SS.R., has been named Director of the Redemptorist International Institute of Higher Studies in Rome.

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Very Rev. Hunter Guthrie, S.J., has been named President of Georgetown University.

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Very Rev. Laurence J. McGinley, S.J., has been named President of Fordham University.

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Very Rev. Paul C. Reinert, S.J., has been named President of St. Louis University.

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Very Rev. Vincent J. Flynn, President of the College of St. Thomas, St. Paul, Minnesota, has been elected President of the Association of American Colleges.

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Rt. Rev. Msgr. Francis A. Burke has been appointed Chaplain to the Massachusetts State Senate, the first Catholic priest to serve in that post.

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The following have been named Knights Commander of St. Gregory the Great: Raymond Bernert, C. Theodore McCort and George Goldcamp, of the Diocese of Steubenville.

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The following have been named Knights of St. Gregory the Great: Philip A. Farley, Dr. Joseph A. Ficarra, Joseph A. McNamara, Michael C. O'Brien, Charles Partridge, George A. Skeehan, David Askins and Columba P. Murphy,

of the Diocese of Brooklyn; James P. Hamblen, Bernard Hamilton and J. Ralph Mulvey, of the Diocese of Galveston; Leroy E. Goodbody and Emmett J. Culligan, of the Diocese of San Diego.

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John G. Liebert, of the Archdiocese of Washington, has been named Knight Commander of the Order of St. Sylvester.

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Dr. Richard E. Dowd and Dr. Francis X. Fiegel, of the Diocese of San Diego, have been named Knights Commander of the Holy Sepulchre.

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Eleanor Figaro, Negro lay apostle of the Diocese of Lafayette, has received the Papal Cross *Pro Ecclesia et Pontifice.*

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Miss Irene Dunne was awarded the 1949 Laetare Medal by the University of Notre Dame.

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Dr. John Myun Chang, Korean Catholic layman, chief Korean delegate to the UN General Assembly in Paris, Ambassador of his country to the United States and a 1924 graduate of Manhattan College, received the honorary degree of Doctor of Laws from his Alma Mater.

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On January 3, Gen. Walter Bedell Smith received the honorary degree of Doctor of Laws from Duquesne University.

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William H. Collins, Washington attorney, has been awarded the Holy Name Society's Vercelli Medal.

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THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. Date: January 31, 1949.

Author: John W. Whelan, LL.B., Instructor of Law, Columbia University.

Title: "The Controversy between Baron Ellesmere and Chief Justice Coke".

Abstract: The paper studied the parts played not only by the principals in the controversy but also by Sir Francis Bacon and Sir Henry Yelverton and traced the course of the controversy to its climax in the establishment of the supremacy of the Chancery Court in Anglo-American Jurisprudence.

II. Date: February 25, 1949.

Author: Dr. Vladimir Gsovski, Chief of the Foreign Section at the Library of Congress and Head of the Russian Department of the School of Foreign Service.

Title: "The Influence of Emphyteusis and Superficies of Roman Law on Soviet Law".

Abstract: The paper showed how the Soviet authorities have been constrained, while retaining public ownership, to adopt devices allowing restricted

ownership of property analogous to the institutes of Roman Law mentioned in the title of the paper.

III. Date: March 31, 1949.

Author: Prof. Heinrich Kronstein, J.U.D., LL.B., S.J.D.

Title: "Conflicts in Conflicts of Laws".

Abstract: The paper dealt with the relation to the field of conflicts of law of factual developments in international law and interstate trade relations.

JUDICIAL PRESERVATION OF THE DYKE AGAINST CONSTITUTIONAL DEMOCRACY

The National Catholic Welfare Conference News Service reports excerpts from a new book by Dr. James M. O'Neill published by Harper & Brothers and entitled *Religion and Education Under the Constitution.*

Dr. O'Neill unreservedly affirms that there is no evidence that the American people have ever adopted the principle of complete separation of Church and State; there is no such evidence, he avers, in the Federal Constitution, in the Acts of Congress, or in the constitutions or laws of the several States.

In the absence of such adoption by the American people, he contends, the mere opinion of individuals or groups of individuals does not create a "great American principle." He insists that to say that this principle is accepted by millions of Americans does not prove it to be an American principle to which all Americans have an obligation to adhere.

He points to the fact that the principles of Catholicism, Protestantism and Judaism are all accepted by millions of Americans but that this is not sufficient to make them American principles.

He argues that Mr. Justice Rutledge, in the New Jersey transportation case, put his finger in the dyke in the dissenting opinion, cheered on by Justices Frankfurter, Jackson and Burton, to hold back the tides of Constitutional democracy until in the McCollum case a new wall of separation (architect unknown) was erected between the people of a State (Illinois) and their democratic control of education within their borders. Whatever architect the wall had must be sought within the portals of the Supreme Court, an instrument of government completely unauthorized to build such a wall, especially since the authorized instruments of government had definitely refused many times in the past to build it.